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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 315

MARION & RYE VALLEY RAILROAD COMPANY
APPELLANT

v.

THE UNITED STATES, APPELLEE

APPEAL FROM THE COURT OF CLAIMS

BRIEF IN BEHALF OF APPELLEE

OPINION BELOW

The opinion of the Court of Claims (R. 41) is reported in ———, Court of Claims.

JURISDICTION

The grounds of jurisdiction are correctly stated in Appellant's brief.

STATEMENT OF THE CASE

Appellant's statement of the case is subject to minor corrections and substantial additions in the following particulars.

ERRORS IN APPELLANT'S STATEMENT

True length of appellant's railroad is 17.7 miles (R. 38, Finding IX), not 22 miles.

The statement on page (3) of appellant's brief that appellant received traffic from the Virginia & Carolina Railroad, through its connection with the Virginia Southern Railroad, is incorrect. The Virginia Southern Railroad did not connect with the Virginia & Carolina Railroad. They were parallel lines, about 25 miles apart, but by reason of the connection of the Virginia Southern with the appellant's railroad and connection of appellant's railroad with the Norfolk & Western, and the connection of the Virginia & Carolina Railroad with the Norfolk & Western Railroad, the Virginia Southern Railroad and the Virginia Carolina Railroad competed for business in the territory lying between the two lines. (R. 38, Finding X.)

ADDITIONAL STATEMENT

The Director General did not at any time take over the actual possession or operation of appellant's railroad, and did not give at any time any specific directions as to its management or operation, and did not at any time interfere with its conduct or activites in any way. Appellant retained the possession and continued in the operation of its railroad during all of the time in controversy and retained its earnings without accounting therefor, to the government in any way and expended same

as it saw fit, and devoted its net operating income to its own uses. (R. 39, Finding XIII.)

In such finding it is agreed:

> That from December 28, 1917, to July 1, 1918, the plaintiff's railroad had a net income of $1,897.43, which sum it retained for its own use; that during the aforesaid period it did not turn over any of its earnings to the Director General of Railroads, or the United States; that from December 28, 1917, to July 1, 1918, the railroad transported the same character of traffic as it had transported prior thereto; that it did not serve any military camps and did not transport any troops or munitions of war during said period; that during said period there was no change in the manner or method of conducting the operation of said railroad * * * the same officials operated the railroad from December 28, 1917, to July 1, 1918, as had operated it prior thereto. It never received any instructions from the Director General of Railroads applying to it individually. The company received no orders with reference to expenditure of money for maintaining its road, and received no instructions as to how it should be operated or maintained other than those heretofore mentioned. No specific instructions as to the road of the plaintiff were ever received by it from the Director General of Railroads. The plaintiff from December 28, 1918 (1917), to June 29, 1919 (1918), continued to operate its road exactly as it had always operated it.

While many general orders and general circulars were sent out by the Director General, during the period in controversy, giving minute instruction in reference to the operation and management of the railroads under Federal control, appellant received only those set out in appellant's statement of facts, and in addition General Order No. 14, submitting report of the American Railway Association as to method of complying with the Federal Daylight Savings Law, and General order No. 28, increasing passenger and Freight Rates on railroads under Federal control, neither of which required appellant to make any change in its operation, maintenance, or in any other respect. (R. 43, Opinion Court of Claims.)

Appellant did not receive General Order No. 27, commonly known as the "Wage Order," issued by the Director General of Railroads May 25, 1918, pursuant to which wages of employees on railroads being operated by the Government under Federal control were increased. Such order was not made applicable to appellant's railroad, did not name appellant or its railroad therein, and was not applied on appellant's railroad. (R. 37, Finding VII.)

Appellant did not keep separate books of account during the period in controversy. It closed its books on January 1, 1918, and opened new books on that date in accordance with its usual custom, which was also in harmony with the directions of

the Director General in General Order No. 2 in respect to railroads under Federal control. (R. 38, Finding XI, and R. 32, Finding III.)

In addition to the four general orders received by appellant, there were issued by the Director General, during the period January 1, to July 1, 1918, 27 other general orders, and 38 numbered general circulars. All are published in public document entitled:

UNITED STATES RAILROAD ADMINISTRATION
DIRECTOR GENERAL OF RAILROADS
BULLETIN NO. 4 (Revised)

PUBLIC ACTS
PROCLAMATIONS BY THE PRESIDENT
RELATING TO THE UNITED STATES
RAILROAD ADMINISTRATION
and
GENERAL ORDERS AND CIRCULARS
ISSUED BY THE DIRECTOR GENERAL
OF RAILROADS
to
DECEMBER 31, 1918

For convenient reference we attach in appendix hereto copies of General Orders Nos. 3, 7, 10, 12, 15, 17, 20, 23, 24, 25, 30, and 31, all issued during the time in controversy and giving specific instructions for the operation and management of railroads under Federal control, none of which were furnished appellant, and none of which were complied with by appellant or in any manner affected the operation or management of its railroad.

Appellant's average net annual railway operating income for the three fiscal years ending June

30, 1917 (Test Period), was $23,252.00; one-half thereof being $11,626.00. The actual net railway operating income for the period January 1 to July 1, 1918, was $1,897.43. The tonnage and revenues of appellant were decreasing in volume and amount prior to January 1, 1918. (R. 40.) Lumber mills at Fairwood and Marion, which were operated during the test period, were abandoned towards the end thereof, and line extending from Troutdale to Fairwood had been taken up. (R. 38, 39, Findings X and XI.)

The appellant claims, and the referees allowed appellant as compensation for the alleged use of its property by the Government, during the time in controversy, the difference between the net operating revenue for the period January 1 to July 1, 1918 ($1,897.43), and one-half the average annual net operating income during the three year test period ($11,626.00), which difference amounted to $9,728.57. In addition to such amount, appellant claims, and the referees allowed for alleged depreciation during the period in controversy, the sum of $2,514.87, arriving at such amount by taking one-half of the average annual charge to depreciation by appellant on its books, during the three year test period. The referees did not find there was actual depreciation and no evidence thereof was submitted to the referees. Appellant claimed and referees allowed for undermaintenance of the railroad for the period January 1 to July 1, 1918, $2,182.50, such amount being one-half of the average annual

maintenance charge for the test period as shown by the books of appellant. The items of depreciation and undermaintenance were grouped together by the referees, however, in the allowance made, allowing for the two items the aggregate sum of $4,697.37, the total allowance by the referees for the items of compensation, depreciation, and undermaintenance being $14,425.94. (R. 14, 15, 18, 19, 20, 21, 22, 40, and 41; also opinion, Referees, R. 5.)

In arriving at the amount of compensation to be awarded, the board of referees assumed a relation of landlord and tenant, as between the government and the appellant. In the opinion the referees state:

> The board finds the compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the government and agreement to pay the fair rental therefor. (R. 12.)

The amount awarded by the referees is based upon the standard return; that is, the average annual net income during the test period, notwithstanding reduced volume of business and increased costs of operation, and reduced net income prior to January 1, 1918. There was no evidence of rental value or of value of appellant's railroad. Such items were ignored, as also the actual operating results during the period in controversy. In the opinion the referees state:

> In our judgment there is insufficient evidence in the record upon which to arrive at

a fair valuation of plaintiff's railroad properties, and we will not, therefore, attempt to consider the percentage return upon the fair valuation in making our finding of just compensation for the use during the said six months' period. There is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental. In our opinion, evidence of earning power offers the best measure for our finding of the fair rental value of plaintiff's property in the claim under consideration. It appears, furthermore, that the rental value must be taken as of the commencement of Federal control * * *. Since we are limited to the determination of the value of the lease as of December 28, 1917, it follows that only the then known conditions, and in addition, such as may be foreseen by reasonably intelligent business men, can be given any weight in our conclusions. This is based on justice and sound reasoning because the lessor of a business would have no standing in court to urge a reduction in rental, if the results of his own management show a declining income; and because he must also assume its risks—the lessee being no longer in a position to dictate its policies and its success depending chiefly upon the efforts and sagacity of the lessor alone. Accordingly our judgment of the rental value of the lease in this case must be based largely upon the evidence before us of plain-

tiff's earning power prior to December 28, 1917. (R. 12 and 13.)

The report of the referees further states:

> Respondent submitted a statement showing the operating income and revenue tonnage of the plaintiff's railroad both prior and subsequent to Federal control. In so far as said statement applies to the period prior to Federal control it is properly given consideration, but not to show traffic conditions after January 1918, or for the purpose of comparison with the six months of 1918, which latter could not have been known at the time when Federal control was instituted, our view being that we must place ourselves in the position of the parties at the time the implied lease was effected. All past and present operations and conditions on December 28, 1917, including matters from which deductions as to future income might be drawn, could under this rule be available for our consideration but not the actual figures of operations subsequent to that date. The country was at war, but what the effect of the war upon the income of the carrier would be was highly problematical. Increased operating expenses were doubtless foreseen, but it might have been expected that freight rates would keep pace with them and a heavy movement of the chief commodities carried by plaintiff for military purposes, resulting in a large net income, might even have been anticipated. (R. 14.)

The Board of Referees also based its finding on the supposition that the Government would continue in possession of appellant's property for a period of years, and arrived at the amount of compensation on such basis, notwithstanding it was known at the time of the hearing, and before opinion of the referees, that the alleged control continued but six months. In the report the referees stated:

> In view of the fact that the duration of Federal control could not be foretold on December 28, 1917, and the lease, therefore, was for an indeterminate period, it is our opinion that the fair rental should be based upon an average of expected earnings for a period of years and not upon the immediate outlook for business for the first six months of 1918. Since plaintiff's operating income for the six years ended June 30, 1917, showed a six months' average of $11,721.92, its claim for compensation based upon the six months' average for the three years ended June 30, 1917, amounting to $11,626.00 (one-half the standard return) is within the six months' average return that might have been expected of the property on December 28, 1917. (R. 14.)

The Court of Claims in its opinion, after reviewing all of the facts, none of which were in dispute, held:

> After reviewing very carefully all the evidence upon which the plaintiff relies to establish a taking of its property for public

> use, the court is of opinion that no taking is shown which comes within the meaning of the Constitution and the law. (R. 44.)

In considering the question of appellant's loss, if any, by reason of the supposed taking of its property, the Court of Claims said:

> There is no proof that it has lost anything thereby. Its property has never been out of its own control. It operated it without let or hindrance by the Government during the entire period for which it is claiming that the Government had possession of it. If any loss was incurred during that time it was the result of the plaintiff's own operation and control of its own property. * * * If the plaintiff did not adequately maintain its property while it was in its own possession and being used by it to the exclusion of the United States and everybody else, is it possible that the United States must pay for the maintenance of its property?
>
> Other reasons are advanced by the plaintiff, and supported by the board of referees, as to why compensation should be awarded the plaintiff in this case. It is not deemed necessary to recite these reasons, which are not sufficient to combat the plain and uncontradicted evidence that the alleged taking of the plaintiff's property did not disturb it in the use and control of its property, nor did it restrict the right of the plaintiff to dispose of it, nor did it cause the plaintiff any pecuniary loss. So if the technical con-

> trol of the plaintiff's property by the United States caused it to lose nothing, no award of compensation can in justice be made. We think that the property of the plaintiff was not taken by the Government. If there was technical control of the property by the government, it was of such a character that it did not cause any loss to the plaintiff, and does not justify the award of any compensation. (R. 44 and 45.)

Appellee contends that the Court of Claims was right in holding and determining that there was no taking of appellant's property entitling it to compensation, and in holding that if appellant's property was technically taken, appellant was not damaged and therefore not entitled to recover.

ARGUMENT

SUMMARY

I. The President did not take possession of the appellant's railroad; nor did he assume control or operation of it.

- (*a*) General Orders and Circulars appellant did not receive.
- (*b*) Cases relied upon by appellant as showing a taking.
- (*c*) Did Congress, through the Federal Control Act, take appellant's railroad?
- (*d*) Congress cannot direct what the decision of the court shall be, or the construction the court shall adopt,

in construing an Act of Congress; nor can Congress determine what facts can show a taking of property for public use. These matters are all of a judicial character and in our system of government must be determined by the courts.

II. If appellant's railroad was taken under Federal control, such control was merely technical or nominal and does not entitle appellant to compensation on the same basis as an owner who was dispossessed and his railroad actually taken possession of and operated by the government.

III. Assuming that appellant's railroad was taken under Federal control as defined by the Federal Control Act, from January 1, 1918, to June 30, 1918, inclusive, the amount of just compensation due it is to be measured by the pecuniary loss suffered by it resulting from such control.

(*a*) Pecuniary loss is measured by the value of the use of which the owners were deprived.

(*b*) No proof that the value of the use was diminished by Federal control, and if so, no proof of the pecuniary value of such diminution.

(*c*) Pecuniary condition of appellant not changed by said control.

(*d*) The assumed fair rental value of appellant's railroad for an indeterminate period used by the board as

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a measure of just compensation was erroneous.

(*e*) The amount of just compensation is not to be measured by the amount to which the President was limited in the making of a voluntary agreement under Section 1 of the Federal Control Act.

(*f*) The prima facie effect given the finding of the board of referees merely establishes a rebuttable presumption.

(*g*) The earnings for a certain prior period should not be used as a basis of comparison with the period of alleged Federal control, unless all conditions of both periods are considered.

(*h*) It was error to refuse to consider evidence of actual operating results during period from January 1, 1918, to July 1, 1918.

(*i*) The board of referees adopted an erroneous basis for awarding compensation, considered improper and incompetent evidence and refused to consider competent evidence bearing on appellant's loss, if any, from the alleged taking of its property, and its report is, therefore, without prima facie effect.

(*j*) Allowance by board of referees for maintenance and depreciation.

I

The President did not take possession of appellant's railroad; nor did he assume control or operation thereof

The foregoing proposition must be determined from the facts found by the Court of Claims, the just inferences to be drawn therefrom, and such other facts as are judicially known to the Court.

The appellee contends the appellant's railroad was not taken possession of by the President, and was not used or operated by him, but, on the contrary, remained at all times in the possession and use of the appellant and was operated by appellant in accordance with its own judgment and discretion, and the appellant received and retained all the revenues derived from such operation and devoted same to its own uses.

On the question of whether appellant's railroad was taken possession of and operated by the President, the burden of proof is on the appellant. Appellant is asserting a right against the government, and must prove the essential elements of its cause of action. It is not for the government to disprove same. The Court of Claims has found the facts and has drawn the just inference therefrom and has found and determined that appellant's railroad was not taken under Federal control. In the court's opinion it is said:

> After reviewing very carefully all the evidence upon which the plaintiff relies to establish a taking of its property for public

> use, the Court is of opinion that no taking is shown, which comes within the meaning of the Constitution and the law. (R. 44.)

Appellant must, we think, before being entitled to a reversal of the judgment of the Court of Claims, show that the facts as found by the Court, and the just inferences to be drawn therefrom, establish affirmatively a taking of its property by the President. Appellant relies on the Proclamation of the President, issued December 26, 1917, and upon the receipt by it of four general orders and two unnumbered circulars, issued by the Director General of Railroads, none of which specifically apply to appellant's railroad and neither of which require any act of commission or omission on the part of appellant, or constitute any invasion of its rights or interference with its property, or the operation or use thereof. The Proclamation of the President was very broad in its terms, as was probably necessary under the circumstances presented; but such proclamation did not of itself constitute a taking of appellant's property. The proclamation did not purport to take possession of any system of transportation *in praesenti,* but rather constituted an announcement of a purpose to take possession of a very large number of systems of transportation in the future—a purpose that might or might not be fulfilled. The proclamation was issued December 26th, 1917, and while using words of present import, announced the tak-

ing possession of certain systems of transportation in the future; to-wit, "at 12 o'clock noon, December 28, 1917"—two days thereafter.

We need not argue that the President did not *on December 26,* take possession of the railroads *two days thereafter.* The event could not, by the use of language or otherwise, be projected into the future. The proclamation was, therefore, but an announcement of a purpose or intention to take possession of certain systems of transportation two days subsequent to such announcement; an intention that might be carried out as to some and abandoned as to others. If the President had done nothing more than issue the proclamation, he would be a bold advocate who would contend that any system of transportation had been taken possession of by the President. This is the view of the Court of Claims as expressed in its opinion in this case. The Court says:

> The proclamation by itself did not constitute a taking. If no other step had been taken, and no agent of the President had done anything to carry into effect the proclamation of the President, it would certainly not have been regarded as a taking of the property. The contention of the plaintiff that its property was taken by virtue alone of the proclamation of the President cannot be sustained. (R. 43.)

Something further was necessary, but doubtless when such further necessary act was per-

formed, the possession might relate back to the time named in the proclamation. To crystallize into possession of any particular system of transportation, such further act must be with reference to such particular system. What further action have we in reference to plaintiff's railroad?

Appellant relies on General Orders 1, 2, 14, and 28, as additional acts showing the taking possession of its railroad by the President.

General Order No. 1 is dated December 29, 1917, and is addressed "To all concerned." It recites:

> Pursuant to the Act of the President of the United States, through the Secretary of War, the *undersigned* has taken possession and assumed control of *certain* transportation systems described in the Proclamation of the President. (Italics ours.)

It will be noted that the order advises that William G. McAdoo, *Director General,* has taken possession of certain systems of transportation, pursuant to the proclamation of the President, rather than that the *President,* through such proclamation had taken possession. It will also be noted that the order advises that possession had been taken of *certain* transportation systems described in the proclamation—not that *all* transportation systems had been taken possession of. Between the time of the issuing of the proclamation, and receipt of copy of General Order No. 1, there had been no action taken with reference to appellant's railroad. The general order was in relation

to what the *Director General* had done; that is, the taking possession of *certain* railroads, of which "officers, agents, and employees of *said* transportation systems are to take immediate notice." The order contains some general instructions, which could apply only to those transportation systems the Director General had taken over, and to the employees thereof, but could not apply to the appellant, as, up to that time, there had been no act by the Director General with respect to its railroad. The general order did not purport to take possession of any railroad, but did advise that the Director General *had* taken possession and assumed control of certain transportation systems described in the proclamation. The order was dated December 29, 1917, and deals with a *completed* act, not a *contemplated* one. Sending a copy thereof to the appellant, not addressed to it or to any of its officers, did not amount to the taking possession of appellant's property, and did not invade any of its rights, did not interfere with its possession or right to operate and use its railroad, and did not indicate an intention or desire on the part of the Director General to "take possession" or "assume control" of appellant's railroad. The order does not contain any instructions or directions, which, if followed by appellant, would involve any change or modification in its use or operation of its railroad. Upon receiving copy of the order, the managing director of appellant having "some doubt

as to whether his road was was intended to be taken under Federal control," wired the Director General inquiring whether the road was under Federal control, and if he should observe the order. He received a reply from the Director General directing him " to obey the order." It is noted that he was not advised that the road was under Federal control. (R. 36, Finding V.)

A copy of General Order No. 2, addressed " To the Chief Executives of the Railroads," and dated December 29, 1917, was received by appellant. Such order provided that—

> Until otherwise directed, no changes in the present methods of accounting as prescribed by the Interstate Commerce Commission will be required.

and that the accounts shall be closed as of December 31, 1917, and opened as of January 1, 1918—

> in the same manner as heretofore handled at the close of one fiscal year and the beginning of another, and in the same manner that you should have handled your accounts had the Government not taken possession and control. (R. 32.)

Appellant received copy of a circular dated January 8, 1918, issued by the Director General, addressed " To all Railroad Officers and Employees," and urging the necessity for patriotic service in the operation of the railroads as a means of successful prosecution of the war. Such circular closed with the following:

> I am giving careful consideration to the problems of railroad employees and every effort will be made to deal with these problems justly and fairly at the earliest possible moment. (R. 33.)

If the Director General regarded the appellant's railroad as being under Federal control, he violated this assurance in issuing General Order No. 27, increasing wages of railroad employees, for same was not made applicable to appellant's railroad, and its railroad was not named or mentioned therein. (R. 27, Finding VII.)

Appellant received a copy of a letter dated January 18, 1918, addressed to L. A. Ambler, General Manager, Virginia Southern Railroad Company, signed by William G. McAdoo, Director General, urging all railroads to cooperate with the Fuel Administration in accumulating and distributing an ample fuel supply. (R. 34.)

Appellant received copy of General Order No. 14, dated March 25, 1918, containing instructions in reference to compliance with the Federal law " to save daylight and to provide standard time for the United States." (R. 34.)

Notice of the regulations thus put into effect was important to all having relations with the railroads under Federal control, and especially carriers not under Federal control, having connections and interchange of traffic with Federal control railroads.

Appellant also received a copy of General Order 28, dated May 25, 1918, and providing for an increase in freight and passenger rates on railroads under Federal control, effective June 10, 1918, as to passenger rates, and June 23, 1918, as to freight rates. (R. 35.)

This order was not specifically applicable to appellant's railroad and appellant did not understand it so to be, and after its issuance, and in June, 1918, appellant was urging the Virginia Corporation Commission to grant an increase in its transportation charges. (R. 36, Findings V and VI.)

The Commission declined to act, believing appellant's railroad was under Federal control, whereupon appellant went to the Interstate Commerce Commission, and later to the Railroad Administration, and was authorized by both to put into effect on appellant's railroad, the increased rates authorized in General Order 28. (R. 36, Findings V and VI.)

It will be noted, however, that appellant put the increased rates into effect and the Director General did not. Under Section 10 of the Federal Control Act, the Director General could only put rates into effect by filing same with the Interstate Commerce Commission. This he did not do in respect to appellant's railroad. Such action, in authorizing appellant to put such increased rates into effect, was not, we think, an assumption of possession, or control, but rather the Di-

rector General, in conjunction with the Interstate Commerce Commission, acquiesced in such action by the appellant—an acquiescence probably resulting from the refusal of the Virginia Corporation Commission to assume jurisdiction, and a conviction that appellant's transportation business required an increase in its rates, and that if neither the Interstate Commerce Commission, nor the Director General objected, in view of the attitude of the Virginia Corporation Commission, appellant would not be interfered with in applying such increased rates.

The foregoing are the only orders, circulars, communications or other acts of the Railroad Administration coming to appellant's knowledge, or that could in any way affect appellant or its property, with the exception of the alleged order of relinquishment, dated June 24, 1918, addressed to T. S. Ambler, General Manager, Marion & Rye Valley Railway Company, and signed by John Barton Payne, the then General Counsel of the United States Railroad Administration. Same recites:

> DEAR SIR: It is not clear whether the Marion & Rye Valley Railway Company has at any time been under Federal control. To remove any possible question, this order is issued definitely relinquishing same. (R. 37, Finding VIII.)

The language of the order of relinquishment shows that the chief law officer of the Railroad Ad-

ministration did not regard appellant's railroad as being under Federal control. The conduct of appellant, in going before the Virginia Corporation Commission, to procure an increase in rates in June, 1918, shows that appellant did not at that time regard its railroad as being under Federal control. The appellant received no instructions as to how it should operate its property, or how it should maintain it, or how it should spend its money, or what disposition should be made thereof at any time.

> The same officials operated the road, from December 28, 1917, to July 1, 1918, as had operated it prior thereto. It never received any instructions from the Director General of Railroads applying to it individually. The company received no orders with reference to the expenditure of money for maintaining its road and received no instructions as to how it should be operated or maintained, other than those heretofore mentioned. No specific instructions as to the road of the plaintiff were ever received by it from the Director General of Railroads. Plaintiff from December 28, 1918 (1917) to June 20, 1919 (1918), continued to operate its road exactly as it had always operated it. (R. 39 and 40, Finding XIII.)

(a) General orders and circulars appellant did not receive

Prior to June 24, 1918, there were issued by the Director General thirty-two general orders and thirty-eight numbered general circulars, many of

which give important and detailed instructions in reference to the management, operation, accounting and conduct of the railroads under Federal control, none of which were sent to, or received by appellant, except only those already specifically referred to. As illustrative, and for ready reference, we have attached in appendix hereto, copies of general orders hereinafter specifically referred to. We think same can be considered as bearing upon the intention and understanding of the Government as to the status of appellant's railroad during the time in controversy, and on the question of whether appellant's railroad was taken by the Goverment, since the Court will take judicial notice of such general orders and their contents. (*Davidson* v. *Payne,* 289 Fed. 69; *Houston East & West Texas Railway* v. *Tanner,* 227 S. W. 713, Tex.)

General Order No. 3 (Appendix, p. 87), dated January 5, 1918, was a very important order changing demurrage rules and increasing tariff charges on Federal Control railroads, but appellant did not receive a copy and did not comply therewith.

General Order No. 7 (Appendix, p. 88), dated January 29, 1918, provided for sweeping changes in demurrage regulations, and required cancellation of all conflicting provisions, but appellant did not receive a copy or comply with it.

General Order No. 10 (Appendix, p. 90), dated March 14, 1918, required carriers under Federal

control to make an inventory of supplies on hand as of December 31, 1917, and required same to be completed by May 1, 1918, but appellant did not receive a copy and did not make an inventory. The purpose of this order was to furnish a basis for settlement with carriers under Federal control, for materials and supplies taken over by the Government.

General Order No. 12 (Appendix, p. 91) contained minute instructions with regard to all railroad expenditures chargeable to capital account. This was important in making final settlement with carriers under Federal control, but appellant did not receive or comply with it.

General Order No. 15 (Appendix, p. 94), dated March 26, 1918, contained definite instructions in reference to installing new, and maintaining old industry tracks, placing the expense thereof largely on the industry, instead of carrier as theretofore, but appellant did not receive or comply with it.

General Order No. 17 (Appendix, p. 95), dated April 3, 1918, contains very detailed directions in reference to accounting for transactions arising during Federal control, but appellant did not receive or comply with it.

General Order No. 20 (Appendix p. 100), dated April 22, 1918, directed the discontinuance of technical and arithmetical checking of bills and statements covering interline matters as between carriers under Federal control. Such checking be-

came of little importance since errors as between carriers under Federal control did not involve any loss to the government. Any over or under payment as between carriers was merely an over or under payment of the government to itself. In such view such checking was a needless expense. To discontinue such checking of bills of non-federal carriers would be indefensible and it is significant that appellant did not receive the order.

General Order No. 23 (Appendix, p. 101), dated May 2, 1918, provided:

> Each and every carrier under Federal control shall render a weekly cash report upon Form T-5, as per copy herewith. The first report shall be rendered as of May 4, 1918.

This order was not sent to appellant and it made no such reports.

General Order No. 24 (Appendix, p. 101), dated May 16, 1918, directed carriers under Federal control to renew no fire insurance on their properties, but appellant did not receive or comply with it.

General Order No. 25 (Appendix, p. 102), dated May 20, 1918, required the business of carriers under Federal control to be conducted on a cash basis and forbade extending of credit to shippers except in cases where bonds were given, but appellant did not receive it.

General Order No. 27, dated May 25, 1918, provided for an increase in wages of railroad employees generally on railroads under Federal con-

trol, but was not made applicable to appellant's railroad, and was not applied thereon. (R. 37, Finding VII.)

General Order No. 30 (Appendix, p. 105), dated June 12, 1918, contains minute instructions for settlement of inter-road bills and accounts " rendered by one carrier under Federal control against or on account of another carrier under Federal control," and expressly provided that regulations therein should not apply to " settlement of accounts between a carrier under Federal control and a carrier not under such control." It is significant that this order was not sent to appellant. It is also significant that this and other orders referred to recognizes the existence of connecting carriers with whom interline and inter-road accounts and bills were developed, which were not under Federal control.

General Order No. 31 (Appendix, p. 108), dated June 12, 1918, promulgated rules and regulations covering accounting for use of equipment and facilities of one carrier under Federal control by or on account of another carrier under Federal control. Appellant did not receive this order.

On May 21, 1918, the Director General issued an order, published in Public Document, Bulletin No. 4 (Revised), hereinbefore referred to, page 113, copy at Appendix (p. 111), providing for the appointment of Federal Managers for railroads under Federal control, establishing additional regions for

operation, and appointing additional regional directors. Such order provides in part:

> In view of the direct responsibility for the operation of the railroads of the country, placed upon Director General McAdoo, by the Act of Congress, and by the proclamation of the President, he has been unable to escape the conclusion that it will be advisable to place in direct charge of each property, for operating purposes, a representative to be known as the Federal Manager, who will report to the Regional Director. As far as practicable this Federal Manager will be chosen from the operating officers of the particular property, who are therefore entirely familiar with its employees and with its conditions. * * * In the development of this policy, the Regional Directors and also the Federal Managers will be required to sever their official relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.

No Federal manager was appointed for appellant's railroad; no officer of appellant severed his relations with the company, or became an "exclusive" representative of the Railroad Administration. On the contrary, appellant continued in the possession, operation, and use of its railroad "without let or hindrance by the government during the entire period for which it is claiming that

the government had possession of it." (Opinion, Court of Claims, R. 44.)

The failure to furnish the appellant with the foregoing general orders, covering in detail many essential features of the operation, accounting and management of the railroads under Federal control; and the failure to appoint a Federal Manager for appellant's railroad, is, to our minds, far more significant on the question of whether appellant's property was taken by the Government, than is the fact that appellant was furnished copies of four orders, which did not in any way affect its conduct or the operation of its road. The only orders issued by the Director General, which could have affected the appellant in the operation or management of its road, were not furnished to it. It received only four orders, which did not in any way affect it.

Failure to furnish these important orders, and failure to appoint a Federal Manager, cannot be regarded as inadvertent. If the road was regarded as under Federal control, failure to furnish such orders was inconceivable neglect. If they were proper to be observed by railroads being operated by a Federal Manager, selected by the Director General, and required to sever relations with the owning company, their observance was much more important when the conduct and operation of the road was left in charge of the owner whose interests were, in many respects, adverse to the Government.

(b) Cases relied upon by appellant as showing a taking

The cases relied upon by appellant do not justify its contention. In *Northern Pacific Railway Company* v. *North Dakota,* 254 U. S. 135, the taking for public use was not questioned. A Federal Manager had been appointed and was in possession of the railroad. The railway company had been entirely dispossessed and excluded from its property. Question involved was the power of the President, under the Federal Control Act, to prescribe rates, intra and inter state, for transportation on the railroad in the government's possession.

In *Duckett & Co.* v. *United States,* 266 U. S. 149, docks and warehouses belonging to and a part of a system of transportation owned by Bush Terminal Company in Brooklyn, were taken by the President, through the Secretary of War, under authority of the Act of August 29, 1916, C. 418, 39 Stat. 619–645, being the same statute, pursuant to which the President took possession of the railroads. To accomplish the taking, the President, through the Secretary of War, issued a general order dated December 31, 1917, specifically describing the property to be taken, and advising that same was taken for public use, which was served on the Bush Terminal Company on January 3, 1918, and on the Receiver of Duckett & Co., a lessee in possession of a part of the property taken. The notice advised that the property had

been requisitioned for the use of the embarkation service of the United States Army, and those in possession were required to vacate same. A conference between the representatives of the United States and the occupants and owners followed, and as a result the United States took possession on January 31, 1918. This was held to be a taking. It is the failure to do affirmative acts equivalent to what was done in the *Duckett case,* which differentiates the *Duckett case* from the case at bar.

In *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U. S. 327, the Court held there was a taking because the demurrer admitted the allegations of the petition, which charged that the Government had installed a battery, so located as to permit of discharging projectiles over plaintiff's land; that the Government had done so on several occasions, and intended to continue to do so when it saw fit, and that the imposition of such servitude deprived the owner of profitable use of the property.

In *United States* v. *Russel,* 13 Wall 623, owners of a vessel were instructed by military officer having authority in the premises, that—

> imperative military necessity requires that you make no arrangement for private freight, without first consulting this office, and obtaining permission in writing so to do.

While the vessel remained in the possession of its owners, they were forbidden to use it for their purposes. They were obliged to hold the vessel out of service awaiting the Government's pleasure. They could make no use of it without express permission of the Government. It is clear the vessel was taken for public use during the time the owners were deprived from using it, but the facts showing the taking of the vessel are entirely wanting in the case at bar to show a taking of appellant's property. Appellant remained in possession and in undisputed use and enjoyment of its railroad, collected the same charges, transported the same traffic for its regular patrons to the full extent offered, and received the earnings and disposed of same as it saw fit. Nothing done by the Government caused any diminution of appellant's traffic or earnings, or affected its operation. Surely the *Russel case* does not aid appellant.

All of the cases relied on by appellant are in harmony with the doctrine announced by the Court of Claims in its opinion in this case, which is:

> It is not always necessary that in order to constitute a taking, the property should be absolutely taken. If there is a serious interruption to the common and necessary use of the property, such interruption may be equivalent to the taking of it; but there must be evidence to show that the use of the property was such that its common and necessary use was so seriously interrupted as

to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him from deriving the benefits which would have accrued had the property not been taken.

These principles are particularly applicable in cases where the alleged taking is for the use of the property for a time, and not the taking of the title. There can be no taking of private property for public use, unless there is possession and use thereof for public purposes, evidenced by some act which deprives the owner of the use, possession, control, and operation of his property. A mere declaration of an intention to take can not constitute a taking. The proclamation of the President setting forth that on some future date he will take over the property of certain owners, does not of itself constitute a taking of the property. There must be some definite act, some positive proceeding by which the property is actually taken and appropriated before the taking can be consummated. It must be such a taking of the property that the owner is deprived of or circumscribed in some way in the use and enjoyment of his property. If his possession is undisturbed and his property in its value and use is undiminished, it can not be said that there is a taking within the meaning of the Constitution. (R. 42.)

Surely the foregoing doctrine is sound and was correctly applied to the facts of this case by the

Court of Claims, in holding that appellant's railroad had not been taken. The appellant was not deprived of possession; it was not interfered with in operation; it was not circumscribed in the use; its revenues derived therefrom were not diminshed; its expenses of operation were not increased. On the contrary, its own officials continued in possession and operated same without any instructions or directions from the Government. They received and expended the revenues as they saw fit and retained the net income for appellant's use. They operated and maintained the railroad in accordance with their own judgment and discretion. Appellant during the time in controversy, "continued to operate its road exactly as it had always operated it." (R. 39 and 49.)

It may be the President's proclamation and General Order No. 1 created in appellant a doubt as to the status of its railroad—a hope that it was taken or a fear that it was not taken. It is not unlikely that the President's proclamation indirectly caused the proceedings before committees of Congress, referred to in appellant's brief (pp. 25 to 29), which resulted in provision in the Federal Control Act to be hereafter discussed, and which appellant contends aids in establishing the taking of its railroad. It may be the President's proclamation, on account of the general description of the properties to be taken, created some uncertainty, which may have caused some embarrassment to appellant, but such

uncertainty or embarrassment did not constitute such an interference with appellant or its railroad as would constitute a taking. Not every direct interference with property, or the use thereof, will constitute a taking for public use. In carrying out its lawful purpose, the Government oftentimes directly interferes with property of the citizen and with the rights of the citizen, causing serious loss or destruction of property, and yet there is no taking for public use. It is probable the taking of other railroads, following the President's proclamation, was a much more serious embarrassment to appellant in the operation of its own railroad than any direct effect of the proclamation on appellant's railroad, or its operation; but the Government in interfering with the operation of appellant's railroad by the taking and operating of other railroads, did not thereby take the appellant's railroad, and did not thereby become liable to appellant as for a taking or on any other theory. The Government is not liable for consequential damages to the owners of property, resulting from the taking of other property. This question is fully considered in the recent case of *Omnia Commercial Company* v. *United States,* 261 U. S. 502, 67 L. Ed. 773, where the Government, by requisitioning the entire product of a steel mill, for the year 1918, deprived the plaintiff of the benefits of a contract with the Steel Company, which would have been very profitable to the plaintiff had the

Steel Company not been deprived of the power to carry it out, by reason of the action of the Government in requisitioning his entire product.

We conclude that neither the President, by his proclamation, nor the Director General, by any act thereafter, took appellant's railroad, within the meaning of the Constitution or the law, and unless Congress accomplished a taking through the Federal Control Act, there was no taking of appellant's railroad.

The effect of the Act of Congress in enacting the Federal Control Act will now be considered.

(c) Did Congress, through the Federal Control Act, take appellant's railroad?

Section 1 of the Federal Control Act of March 21, 1918 (40 Stat. 451), set out in full in Appendix, page 82, contains the following:

> That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act.

Appellant's railroad is of the character described, since it was engaged in general transpor-

tation, was not owned, controlled or operated by another carrier company and connected with the Norfolk & Western, a railroad under Federal control. In Appellant's brief (pp. 25 to 29) it is shown that representatives of such railroads urged upon Congress the inclusion of such provision in the Transportation Act. The only occasion for its inclusion was the conviction that either the President had not taken such railroads, or the question of a taking was in doubt. By such provision Congress undertook either to take such railroads or to determine that same had already been taken by the President. If the provision constituted a taking, such taking was as of March 21, 1918, and compensation for the taking should be limited to the period thereafter and up to time of relinquishment. Since the language of the provision does not purport to be a taking, and since there appears to be no purpose to assume the power reposed in the President to determine what railroads should be taken to aid in the prosecution of the war, in Section 1, of the Act of August 29, 1916, entitled—

> An Act making appropriation for the support of the Army for the fiscal year ending June 30, 1917, and for other purposes (39 Stat. 645),

we conclude the purpose of the provision was to set at rest the question of whether such railroads had been taken by the President pursuant to his proclamation of December 26, 1917. Congress did not, however, have jurisdiction to determine such

question. This Government is one of divided powers. It is the province of Congress to legislate, and the Executive to execute the powers conferred by Congress, and it is the province of the Court to determine what the law is, and to determine the facts to which the law is applicable, and the resultant rights of the parties under the law and facts.

(d) Congress can not direct what the decision of the court shall be or the construction the court shall adopt in construing an act of Congress; nor can Congress determine what facts will show a taking of property for public use. These matters are all of a judicial character and in our system of government must be determined by the Courts

The provision of the Federal Control Act, above quoted, describes certain classes of railroads, and then provides that such railroads, "shall be held and considered as within Federal control, etc."

This language is, in terms, a direction to coordinate branches of the Government to treat such railroads as if they had been taken by the Government, whether they had been so taken or not; or else it is an instruction to treat the facts bearing upon the question of whether such roads had been taken, as conclusive that they had, in fact, been taken by the Government. It must be remembered that the Act of Congress under which the railroads were taken possession of by the Government, left it to the discretion of the President as to which, if any of them, he should take. The taking, if at all, was an act of the President. The law could not become operative in respect to a particular road until

the President exercised his discretion and power to take it. Unless he exercised such power and took possession of a road, it was not taken. The Federal Control Act was not enacted until nearly three months after the act of taking by the President was an accomplished fact. The Federal Control Act begins with the recital:

> The President, having in time of war taken over the possession, use, control and operation * * * of certain railroads and systems of transportation * * * is hereby authorized to agree with and to guarantee to any such carrier * * * that during the period of such Federal control, it shall receive as just compensation an annual sum, etc.

If the proclamation of the President, and things thereafter done by his representatives, constituted the taking of such railroads, there was no occasion for the provision quoted. If they were of the roads described in the beginning of Section 1, of the Act, there was no occasion for special legislation in reference to them. It must be, therefore, that neither those interested in such railroads, who urged such enactment upon Congress, nor the Congress which enacted the measure, understood or believed that such railroads had been taken by the Government. At least, it is apparent there was a controversy in which the representatives of such railroads were urging that such roads had been or should be taken, and that representatives of the President

were insisting upon the contrary. The language used would indicate a purpose to give to the acts of the President a significance they would not otherwise have. To dispose of the question of the taking of such railroads, Congress did not undertake, by its legislation, to take possession of such railroads in behalf of the Government, but undertook to do so by directing the executive and judicial department of the Government to regard what had been done as accomplishing the taking thereof, whether legally sufficient therefor or not. The fiat of Congress that the property is to be regarded as under Federal control, notwithstanding there had been no taking, would not bring the property under Federal control, and would not protect the executive from being a trespasser if he undertook, without consent of the owner, to treat the property that had not been taken, as though it had, in fact, been taken by the Government. Suppose the owner did not desire that his property should be taken, and the acts of the President prior to the legislation in question did not constitute a taking. In such situation the Government could still lawfully take his property, but the taking would not relate back prior to the doing of the acts which constitute a taking. Applying such thought to the appellant's railroad, if it had not been taken prior to the enactment of the Federal Control Act, the owner would not be entitled to compensation for its use before the taking; nor would the Government

be entitled to receive the earnings, or be liable for operating expenses prior to the taking. The award of the referees in this case is not based on the thought that the provision in question constituted a taking, for it has attempted to allow compensation and charge the Government with operating expenses, maintenance, depreciation, etc., from January 1, 1918. That the board of referees did not regard the act as constituting a taking is shown in its opinion, where it is stated:

> Furthermore, the board considers that paragraph 7 of Section 1 confirms a Federal control already established by the President's proclamation and does not regard it as an original taking of control. (R. 8 and 9.)

In such view the question is squarely presented as to whether Congressional enactment can take the place of definite acts by the President, to whom was entrusted the discretion of determining what railroads should be taken and the doing of the necessary acts to take them. Whether such railroads were taken must be determined by the court. The fact of a taking cannot be decreed or determined by Congress. The thought involved is considered in the celebrated case of *Marbury* v. *Madison,* 1 Cranch 137–167, which involved the question of appointment of a notary public. In discussing the power and duty of the court to determine questions of fact, Chief Justice Marshal used the following language:

The power of nominating to the Senate, and the power of appointing the person nominated, are political powers to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If by law the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed can not be made never to have existed, the appointment can not be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by law, and are not resumable by the President. They can not be extinguished by Executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defence had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

So, if he conceives that by virtue of his appointment he has a legal right either to the commission which has been made out for him or to a copy of that commission, it is

> equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

In the case at bar we say the acts of the President and his representatives, which do not amount to a taking, cannot be decreed by Congress to constitute a taking. Facts which do not exist, cannot be decreed to have existed, any more than "a fact which has existed cannot be made never to have existed." Whether appellant's railroad was taken is a question of fact. The determination of such question is necessary exercise of judicial authority, to the same extent as the question of whether a right has vested. Judicial authority for the determination of such questions is vested solely in the courts. This is true, both from the standpoint of the owner of property and from the standpoint of the government. That Congress cannot by its enactment determine what the law has been, as distinguished from what the law should be in the future, is illustrated in *United States* v. *Claflin*, 96 U. S. 546–548. On enacting revised statutes in 1874, Congress provided:

> All acts of Congress passed prior to said first day of December, 1873, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts not contained in such revision having been repealed or

> superseded by subsequent acts, or not being general or permanent in their nature.

A part of an Act of 1823 was carried into the revised statutes and a portion was not, and it was contended that the portion omitted was, by reason of the foregoing language, repealed. In denying such contention, the Court said:

> But that clause indicates a belief on the part of Congress that it had been previously repealed, and doubtless that it was repealed by the act of 1866. The indication is found in the words that declare all parts of acts not contained in the revision, but other portions of which are, to have been repealed or superseded by subsequent acts. This, however, though entitled to great respect, ought not to be considered as more than an expression of opinion or a recital of belief. It is not in the form of an enactment. It is not a declaration of Congressional will. It is not a rule for the future. * * * Whether a statute was repealed by a later one is a judicial, not a legislative question. And even a declaratory act, or an act directing how a former act shall be construed, is inoperative on the past, though controlling in the future.

The question of whether the Act had been repealed was a question of fact to be determined by the Court, and Congress could not, by stating that it had been repealed, accomplish such result or affect the action of the court therein.

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In *Koshkonong* v. *Burton*, 104 U. S. 668–678, is a well considered discussion of the question involved. A legislative enactment assumed to declare what was the true intent and meaning of previous legislation. In holding that it was the province of the court to determine such meaning, the court said:

> When counsel in *Ogden* v. *Bladkledge*, 2 Cranch 272, 277, announced that, to declare what the law is, or has been, is a judicial power, to declare what the law shall be is legislative, and that one of the fundamental principles of all our governments is that the legislative powers shall be separate from the judicial, this court interrupted them with the observation that it was unnecessary to argue that point. Prior to the passage of the act of 1868 the highest judicial tribunal of the State had adjudged that when a sum was to be paid at a specified time as interest, that sum bore interest from that time until paid. This was an adjudication as to what was the local law in that class of cases. And the utmost effect to be given to a subsequent legislative declaration, as to what was the proper meaning of the statutes which had thus been the subject of judicial construction, would be to regard it as an alteration of the existing law in its application to future transactions, especially where, as was the case in the Act of 1868, that declaration was accompanied by a distinct provision, in terms changing the pre-existing law.

The same thought is involved in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312–327. Congress undertook to say that certain matters should not be considered in arriving at the value of a dam which was being taken for public use, by authority of Congress. The court said:

> By this legislation Congress seems to have assumed the right to determine what shall be the measure of compensation. But this is a judicial and not a legislative question. The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character; but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry.

If the matters involved in the foregoing cases were for the determination of the courts, and beyond the power of Congress, we think there can be no doubt that the question of whether appellant's railroad was taken must be determined by the court upon the testimony showing what was done by the President and his representatives. The President has persistently contended that the rail-

road was not taken. The controversy is peculiarly one for judicial determination. Congress being without judicial power could not determine such question. Since Congress evidently did not, by such enactment, assume to take possession of appellant's railroad, and appellant's claim for compensation for the entire period January 1 to July 1, 1918, is inconsistent with the idea that its railroad was taken by Congress in enacting the Federal Control Act on March 21, 1918, we must assume that what Congress attempted was to instruct the executive and the judiciary to treat the acts of the President and his representatives as a taking of all railroads of the character described. This was, we think, beyond the power of Congress. Having reposed in the President a discretion as to what railroads should be taken, it could not declare that he so exercised his discretion as to take a railroad if, in fact, the railroad had not been taken by him. Congress could not instruct the Court to decide that the railroad had been taken, when, in fact, it had not been taken. A decision of the Court, based upon such instruction, would be a denial of due process of law to the owner, and would be a usurpation of the function of the courts, which in our system of government are made independent of the legislature and bound by the Constitution to exercise free and untrammelled the functions bestowed upon them. Instead of aiding the appellant, this provision rather establishes that the President, the representatives of such rail-

roads, and Congress, were of opinion these railroads had not been taken and that legislation was necessary to bring about a determination that they had been taken; otherwise why the enactment of the provision?

We think, therefore, the Court of Claims rightly held appellant's railroad had not been taken for public use and that appellant was not entitled to compensation.

II

If appellant's railroad was taken under Federal control, such control was merely technical, or nominal, and does not entitle appellant to compensation on the same basis as an owner who was dispossessed and its railroad actually taken possession of and operated by the Government

The facts in reference to appellant's railroad have been fully discussed in preceding division of our argument, and we refrain from repetition. If there was a taking of appellant's railroad, same was constructive only and did not involve an actual invasion of appellant's possession. If the Government can be said to have operated appellant's railroad, it did so only constructively through the appellant; not on the Government's judgment, but on appellant's, " without let or hindrance by the Government," to use the language of the Court of Claims. (R. 44.)

Under such circumstances, we inquire, What principle of law or justice requires the Government to place appellant in a better position than it would

have occupied if the things done by the Government had not been done? The usual measure of compensation for taking private property for public use is the value of the thing taken. This is the rule, we think, whether the thing taken is the property itself, or a mere temporary use thereof. "The value of the property, generally speaking, is determined by the productiveness—the profits which its use brings to the owner." *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312–328. The foregoing is in reference to permanent taking of property. Such doctrine is equally true when only the temporary use of the property is taken. At most the Government took only the temporary use of appellant's railroad, and the utmost compensation that should be awarded is the value of such temporary use. In the language of the *Monongahela case,* such value is "the profits which the use brings to the owner." Appellant, however, has already had such profits. This is true even though it be conceded that appellant was operating the railroad for the Government. Appellant received all the revenues accruing from its use. The same kind and volume of traffic was transported as would have been transported had the Government not intervened. The same rates were charged and the same operating expenses incurred, and presumably the same maintenance expenditures. There is no basis upon which it can be claimed that the net income, which appellant retained and still has, was

or could have been greater if none of the things charged against the Government had been done. Appellant has therefore received the "profits which its use" would have brought if the President's proclamation had not been issued. The only thing which by any process of reasoning can be attributed to the Government, and which affected the earnings during the period in controversy, is the applying of the rates for transportation prescribed in General Order No. 28, for a few days before July 1, 1918. Since the rates were thereby increased, and authority to apply same was requested by appellant, it cannot claim any loss in profits on such account. If it be suggested that but for the President's proclamation it would have increased its rates sooner, we say there is no evidence or finding of fact to support such a claim, and it appears that appellant, on its own volition, made application to the Virginia Corporation Commission for such authority in June, 1918, shortly before the alleged order of relinquishment was issued, indicating that the proclamation was not up to that time regarded by appellant as depriving it of the power to increase its rates, which it theretofore possessed. There was no application to increase rates pending on January 1, 1918, so far as disclosed, and if an application had been made at that time, in the absence of the President's proclamation, there is no assurance that it would have been acted on before July 1, 1918, or if acted on, there would have been

an increase in rates that would have permitted of net earnings equal in amount to those of the test period—the basis of the referees' award and of appellant's claim.

The measure of compensation in cases of a taking for public use is very aptly presented in *United States* v. *New Rivers Collieries,* 262 U. S. 341–3–4, as follows:

> The owner was entitled to the full money equivalent of the property taken and thereby to be put in as good a condition pecuniarily as it would have occupied if its property had not been taken * * * more would be unjust to the United States, and less would deny the owner what he is entitled to.

The evidence in this case demonstrates that appellant was at the end of alleged Federal control of its railroad, ever since has been, and is now in "as good condition pecuniarily as it would have occupied if the property had not been taken." If allowed further compensation, such allowance will place appellant in a better position than it would have occupied and will be unjust to the Government.

The board of referees allowed compensation on the basis of appellant's alleged net earnings for 6 months during the test period when the railroads of the country were unusually prosperous. Appellant's business had substantially decreased before January 1, 1918, as compared with the test

period. (R. 38, Finding X, R. 39, Finding XII, R. 40, Finding XIV.)

The board of referees, as shown by their report, did not undertake to ascertain what, if anything, appellant lost by the alleged acts of the government. It did not attempt to ascertain the "profits" which the use of the property would have brought to the owner, except for the acts of the Government. It did not attempt to ascertain the money equivalent "of the thing of which the appellant was deprived"; nor did it attempt to ascertain the amount, in money, required to place appellant in "as good condition pecuniarily as it would have occupied," except for the acts of the Government; but the board did attempt, without evidence, to imagine a willing lessee, who would rent the property in such time of uncertainty, stress and decreasing business, and increasing cost of operation, on the basis of the earnings during the prosperous three-year test period ending June 30, 1917 and usually referred to as the test period. The board of referees accordingly held that the Government should pay to appellant compensation on the basis of its average net income for the six months of the test period, and in addition, pay the difference between one-half of the amount appellant expended for maintenance of its railroad, on the average, in one year during the test period, and the amount it spent for such purpose during the period January 1 to July 1, 1918;

and also one-half of the average annual amount charged by appellant to depreciation during the test period. There was no evidence of a greater depreciation on account of the government's action; nor that any greater maintenance was rendered necessary. The items were all book-keeping matters and allowed solely on the theory that a willing lessee would enter into a lease on January 1, 1918, to pay appellant such amounts for the use of the railroad during the time in controversy. This doctrine was adopted in spite of the board's conclusion:

> There is no evidence of the amount for which the railroad could have been rented, and there is no likelihood that there was any market for its rental. (R. 12.)

It is certain that no such willing lessee could have been found. It is doubtful, considering the threatening conditions confronting a supposed lessee, whether he would become a lessee of such property at such a time upon any terms. Why then should the board adopt such an artificial and imaginary method of compensation, without any evidence, and contrary to the known facts, when a clear, easy and fair measure of compensation, based upon undisputable evidence, was open to, and we think, obligatory upon it?

We now have the results of operation by appellant. It operated as if there had been no proclamation of the President, and with the same re-

sults; and the proof shows that all revenues derived therefrom have already been appropriated by appellant to the use of itself and the maintenance of the property. The results of such operation show what the profits from use of appellant's property actually were during the time in question, and show amount of appellant's loss, had appellant been deprived of them. Appellant, however, received such profits; hence, it suffered no loss. If the Government had received the profits, such profits would have been the measure of appellant's recovery under the well established and just rule, which must be just alike to the Government and the owner; but, since appellant has already received such profits, it is already fully compensated. The board was evidently misled by the provision of Section 1 of the Federal Control Act, which authorized the President to make agreements to compensate railway companies whose properties were actually taken over and operated by the Government. Such section authorized the President—

> To agree and to guarantee to any such carrier * * * that during the period of Federal control it shall receive as just compensation, an annual sum * * * not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June 30, 1917.

Such provision, however, contemplated that the owner was dispossessed and that the Government

was actually in possession and operation of the property. Such section defines " Federal control " as involving " the possession, use, control and operation " of certain railroads by the President. The President was authorized to agree with the owners of the roads under " Federal control," roads of which he had taken over the " possession, use, control and operation," to compensate them for such taking on the basis of the average annual net income of such roads for the three-year test period. Such provision, however, did not create of the Government a tenant of the property; nor did it transform the taking, which occurred nearly three months before the Federal Control Act was adopted by Congress, into a leasing. The act of taking was still the exercise of the power of eminent domain and was subject to the constitutional right of the owner and of the Government alike, in reference to ascertaining and making compensation for the taking.

The fixing of compensation, in the absence of an agreement, must be a judicial proceeding rather than a legislative act. That the taking was an exercise of the power of eminent domain, and not the creation of the relation of landlord and tenant, or lessor and lessee, is held in *North Carolina Railroad Co.* v. *Lee,* 260 U. S. 16, where it is said:

> Under the Federal Control Act the government operates a railroad, not as lessee, but under a right in the nature of eminent domain.

The same doctrine is announced in *E. I. DuPont de Nemours & Company* v. *Davis,* 264 U. S. 456.

In the case of a taking of property, under the power of eminent domain, the parties may always agree on the compensation if they are able and choose to do so; but if they cannot agree, the courts and not the legislature determine the amount of Compensation. *Monongahela Navigation Company* v. *United States,* 148 U. S. 312, 327, 338; *United States* v. *New Rivers Collieries,* 262 U. S. 343–4.

The fact that the Government was involved, and that the President was the mere agent of the Government, made it advisable for Congress to give the Agent express authority and to limit him as to the amount of compensation he would agree to pay the owners of the properties actually taken; but the fact that the President was permitted to pay such amount did not give the railroad company, whose property was actually taken, the right to demand such amount or the right to have such amount. It is to be remembered that this permission to the President is confined to railroads " in the possession, use, control, and operation " by the President, and creates an authority in the President, but no right in the Railway Company until the President exercises authority and makes an agreement in harmony with the act. Either can decline to agree on such terms, or on any other terms, in which event the rules of law governing the

fixing of compensation for property taken for a public use, as announced and administered by the courts, apply and govern the rights of the parties. Such permission to the President to fix the compensation on basis of average annual net income for the test period did not extend to appellant's property, because it was not in the possession, use, control, and operation of the President. Appellant's property may have been in nominal control of the President, but was not in his possession, use, or operation. All of such matters were necessary to bring appellant's property under the operation of the statute. If, however, it be conceded that appellant's property was under Federal control, *in the absence of an agreement fixing compensation*, the parties are left to the ordinary judicial procedure and to the rules applicable, which require a compensation just to both parties, a compensation that will recompense the owner without giving him a fictitious and exaggerated compensation, and that will require the Government to pay only the amount that will put the appellant in as good condition pecuniarily as it would have occupied if its property had not been taken.

Appellant operated and managed its railroad just as it would have operated and managed it if the government had done none of the things complained of; and the traffic, revenues, and expenses, not having been affected thereby, the net earnings measure the value of the use of the property during

the time in question. Appellant received and retained such net earnings and is therefore " in as good condition pecuniarily as it would have occupied if its property had not been taken." To make a further allowance " would be unjust to the United States." Appellant is not entitled to recover anything in this action, and the judgment of the Court of Claims so holding is right and should be affirmed.

III

Assuming that appellant's railroad was taken under Federal control as defined by the Federal Control Act, from January 1, 1918, to June 30, 1918, inclusive, the amount of just compensation due it is to be measured by the pecuniary loss suffered by it resulting from such control

(a) Pecuniary loss is measured by the value of the use of which the owners were deprived

In the case at bar the thing the owners were deprived of, if anything, by reason of its alleged Federal control, for the first six months of 1918, was the " value of its use."

Under the act of Congress of August 29, 1916 (39 Stat. 645, chap. 418, Comp. Stat. 1916, #1974a, 9 Fed. Stat. Anno. 2d ed. p. 1095) the President was given power—

> In time of war * * * to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other

> traffic thereon, for the transfer or transportation of troops, war material, and equipment, or for such other purposes connected with the emergency as may be needful or desirable.

The extent or degree of the use which the President might make of appellant's railroad was left to his discretion. The object Congress had in mind was to enable the President to assume dominion over the railroads in order that he might, should the emergency require, *utilize the same to the exclusion as far as might be necessary of all other traffic thereon*. The extent therefore of the exercise by the President of the dominion or control assumed over a particular railroad in so far as such exercise may have affected the " value of its use " to its owners is a matter of proof. Just compensation is to be measured by the pecuniary value of the use of said railroad of which the owners were deprived.

In *Cleveland, etc., Ry. Co.* v. *Backus,* 154 U. S. 439, 445, the Court in speaking of the value of a railroad said:

> There is no pecuniary value outside of that which results from such use. The amount and profitable character of such use determines the value.
>
> The value of property, generally speaking, is determined by its productiveness—the profits which its use brings to the owner.
>
> *Monongahela Nav. Co.* v. *United States,* 148 U. S. 312, 328.

> The just compensation required by the Constitution to be made to the owner is to be measured by the loss caused to him by the appropriation. He is entitled to receive the value of what he has been deprived of and no more. To award him less would be unjust to him; to award him more would be unjust to the public.
>
> *Bauman* v. *Ross,* 167 U. S. 548, 574.

The owner is entitled to be put in as good position pecuniarily as he would have occupied if his property had not been taken.

> *United States* v. *New River Collieries Co.,* 262 U. S. 341, 343.

In *United States* v. *Chandler Dunbar Co.,* 229 U. S. 53, the Court on page 76 quotes as follows from the case of *Boston Chamber of Commerce* v. *Boston,* 217 U. S. 189:

> The requirement of the Fifth Amendment is satisfied when the owner is paid for what is taken from it. The question is what has the owner lost, not what has the taker gained.

(b) No proof that the value of the use was diminished by Federal control, and if so, no proof of the pecuniary value of such diminution

The burden to establish the amount of compensation is on the owner of the property and unless he proves by his evidence the amount of damage done, he can recover only nominal damages.

> *Tanner* v. *Canal & Irrigation Co.,* 40 Utah 105, affirmed in 239 U. S. 323.

In *C., B. & Q. R. R. Co.* v. *Chicago,* 166 U. S. 226, a suit to condemn the right to an easement for a street across the right of way of the railroad, held:

> The measure of compensation is the amount of decrease in the value of the use for railroad purposes caused by the use for the purpose of a street. If the opening of the street across the railroad tracks did not unduly interfere with the carrier's use of the right of way for legitimate railroad purposes then its compensation would be nominal.

As said by the Court of Claims in the instant case:

> There must be evidence to show that the use of the property was such that its common and necessary use was so seriously interrupted as to cause loss and damage to the owner thereof, and that the owner was deprived of its control and operation in such manner as to prevent him deriving the benefits which have accrued had the property not been taken. (Rec. 42.)

(c) Pecuniary condition of appellant not changed by said control

Appellant's railroad transported the same traffic in kind and volume as it would have transported had it not been included in the President's proclamation. It charged the same rates, paid the same expenses and made the same repairs to its property and spent the revenue just the same as it would have done and realized the same net returns that it would have realized had the President not is-

sued his proclamation or the Director General the general orders received by appellant. By the testimony of its own General Manager it continued to operate its road from December 26, 1917, to June 29, 1918, exactly as it always had operated it. (Rec. 39, 40, Finding XIII.) The value of the use of appellant's railroad is demonstrated by its net earnings derived from the use thus made of it while so operated. During the period in question it had a net income of $1,897.43 which it retained for its own use; it turned over none of its earnings to the Director General or the United States. (Rec. 39, Finding XIII.) There is no evidence whatsoever that the receipt of the general orders from the Director General caused it any loss of revenue or in any way caused it to increase its expenditures and hence any difference in net income during said period compared with its net income prior thereto can not be attributed to the alleged Federal control of its property. So far as the evidence shows appellant was at the termination of the alleged Federal control in as good condition pecuniarily as it would have occupied if its property had not been taken in the manner shown by the proof.

(d) The assumed fair rental value of appellant's railroad for an indeterminate period used by the board as a measure of just compensation was erroneous

Counsel for appellant contends that the measure of compensation is the rental value of its railroad

during the time it was under Government control. (App. brief 37.)

In *N. C. R. R.* v. *Lee,* 260 U. S. 16, a case where the railroad was being operated solely by the Director General under the Federal Control Act, this Court said:

> The Government operated this railroad not as lessee, but under a right in the nature of eminent domain.

Whether rental value would or would not be a correct measure of compensation such measure can not be used in the case at bar because the board of referees states:

> There is no evidence as to the amount for which the railroad could have been rented; and there is no likelihood that there was any market for its rental. (Rec. 12.)

(c) The amount of just compensation is not to be measured by the amount to which the President was limited in the making of a voluntary agreement under section 1 of the control act

Counsel on page 40 of his brief says "plaintiff's claim rests upon the promise of the United States to pay for the use of the property a sum equivalent to the average of the three-year period mentioned in the proclamation and the law."

By Section 1 of said Control Act, supra, the President was authorized to agree with and to guarantee to any such carrier (of which he had taken over the possession, use, control and operation)

* * *

> that during the period of such federal control it shall receive as just compensation an annual sum * * * for each year and pro rata for every fractional year of such control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth nineteen hundred and seventeen.

By this act Congress merely provided that the President might in his discretion make an agreement regarding the amount of compensation to be paid such carrier with the limitation, however, that such amount should not exceed the above sum unless, as provided in paragraph 6 of said section, he should find the condition of the particular carrier was abnormal during the three-year period referred to so as to make the basis of such earnings plainly inequitable as a fair measure of compensation. Such agreement was a purely voluntary one on the part of the President and of the carrier. The entire scope and purpose of Section 1 was to afford an opportunity for a voluntary agreement. It has no reference to what may be done under Section 3. It does not undertake to establish a rule of compensation. It simply affords an opportunity to keep the question of compensation out of litigation. The idea was to offer a suggestion or basis for a voluntary agreement and thus provide a means of reducing the number of cases which

might go into the courts, with the innumerable delays and uncertainties of litigation. It was an alternative to a law suit. It did not require the President to make any contract of any kind. It was not mandatory.

In the event that no such agreement was made the parties were relegated to a semijudicial body for the ascertainment of the amount of just compensation, if any, due from the Government. Section 3 provided:

> That all claims for just compensation not adjusted (as provided for in Section 1) * * * shall be submitted to a board of referees, (etc.) which board shall give full hearings to such carrier and to the United States; shall consider all the facts and circumstances and shall report as soon as practicable in each case to the President the just compensation. (Etc.)

If Counsel's proposition that the Government agreed to pay the standard return (operating net income for three years ended June 30, 1917) is correct then there would have been no occasion for a hearing before a board of referees, as the Federal Control Act provided that the Interstate Commerce Commission was to certify the standard return; hence the only remaining question, in order to ascertain the amount of just compensation, would be to subtract the earnings of the carrier from such standard return.

(f) The prima facie effect given the finding of the board of referees merely establishes a rebuttable presumption

Counsel for appellant insists (brief, p. 43) that because Section 3 of said Control Act provides that—

> In the proceedings in said court (Court of Claims) the report of said referees shall be prima facie evidence of the amount of just compensation and of the facts therein stated.

the Court of Claims was in error in holding that—

> The finding of the amount of the award for such compensation by the board of referees is prima facie in this court, but the prima facie effect of the award may be overcome if it appears that the board applied an erroneous measure of compensation, or if it appears from the facts found that there was no taking by the government of plaintiff's property for public use. (Rec. 42.)

In *Meeker* v. *Lehigh Valley R. R. Co.,* 236 U. S. 442, 430, in speaking of the provision in Section 16 of the Interstate Commerce Act which provided that in a suit brought to recover an award of damages made by the Commission the findings and order of the Commission shall be prima facie evidence of the facts therein stated, the Court said (43):

> This provision only establishes a rebuttable presumption—At most it is only a rule of evidence.

If the basis or theory used by the board of referees in arriving at the amount of its award is erroneous the prima facie affect thereof is overcome.

Penn. R. R. Co. v. *Jacoby,* 242 U. S. 89.

(g) The earnings for a certain prior period should not be used as a basis of comparison with the period of alleged Federal control unless all conditions of both periods are considered

Although the board of referees found there was no market rental value of the railroad and although it appears from its petition that appellant only claims to have been under Federal control for the first six months of 1918 the board used as a measure of compensation for said six months the fair rental value based upon an average of expected earnings for a period of years in the future and not upon the immediate outlook of business for the first six months of 1918, the period of alleged Federal control. (R. 14.)

To ascertain the value of the use of this railroad to its owners from January 1, 1918, to July 1, 1918, the board took its annual net earnings from June 30, 1914, to and including June 30, 1917, and found what the average of such earnings had been for one year and divided this amount in half, thereby finding the average earnings for six months, which latter sum the board held was the value of the use of the railroad from January 1, 1918, to July 1, 1918.

We contend that if earnings for a certain prior period are used as a measure of future earnings

the prior period covering such earnings should correspond with the period of alleged Federal control, that is, the first six months of the calendar year, because there is frequently a marked difference between the net earnings during the winter months and those during the remainder of the year. The net earnings in the winter months are not only often affected by a decrease in the volume of tonnage but also by increased operating expenses.

(h) It was error to refuse to consider evidence of actual operating results during period from January 1, 1918, to July 1, 1918

In the case of property regularly the subject of leasing, an inquiry as to the terms upon which leases of the property were being made at the time of the exercise of the power of eminent domain, may be a guide to the fair market value for the temporary use of it. That, however, is because in those cases temporary use has a fair *market* value, and the evidence of the agreements reached by willing lessors and willing lessees with respect to similar property stands upon the same footing as, in the case of the taking in fee, do to those sale prices reached by agreement between willing sellers and willing purchasers. These prices, subject to definite limitations, are, however, admitted not as being conclusive as to the fair market value of the thing taken, but as being evidence which may be considered with other evidence in determining what the fair market value was. But even in such

cases what the willing lessee or purchaser would have been willing to pay at the time of the taking is not conclusive as to the value at the time. The fact that persons could be found who would have given or promised a certain amount for the use of the property does not preclude the consideration of the history of the property subsequent to the taking for the purpose of getting at its true value when taken so that compensation may be just to the Government as well as to the owners. This was pointed out by Mr. Justice Holmes in *San Diego Land & Tea Company* v. *Jasper,* 189 U. S. 439, when he said (444):

> Of course it is hard to answer the proposition that value expressed in money depends upon what people think at that time. That determines what they will give for the thing; and, whether they think rightly or wrongly, if they or some of them will give a certain price for it, that is its value then. Nevertheless, it has been held, under some circumstances, even in ordinary suits, that when events have corrected the prophecy of the public the facts may be shown and a more correct valuation adopted. Cases cited.

The board refused to consider evidence offered by appellee showing the actual operating income and volume of revenue tonnage of appellant's railroad subsequent to January 1, 1918, the beginning of alleged Federal control, and also refused to consider evidence showing the result of the operation of the road after such control had ceased.

The case was heard by the board on June 19, 1922, more than three years after the alleged Federal control had ceased. The issue then before the board was not what the owners *might be expected* to lose but what, if any, loss *had* they suffered by reason of said control. The attempt of the board to estimate or guess what an imaginary lessee of the property might have been willing on December 28, 1917, to agree to pay, under the then existing conditions, for the temporary use of the railroad involves the most extreme speculation. Such speculation was wholly unwarranted because the matter did not, at the time of the hearing, lie in the realm of prophecy and speculation but of history. The general economic and other conditions characterizing the period in question could have been fully ascertained. It was unnecessary for the board to try to put itself back nearly four years and, having first pursuaded itself that someone would have leased this property (although it found no one would have done so) to attempt to guess what this imaginary lessee would have paid for it. The rational and judicial thing to have done was to look at the results actually accomplished and to inquire what there was in the record to indicate that the appellant, in the absence of Federal control, could or would have produced any different or better results. It would seem that the net earnings during the period in question should be considered prima facie evidence of what the owners would have earned in the absence of evidence of the acts

of the Government which appellant claims constituted a taking of its railroad, especially in view of the fact that appellant remained in the possession and management and operation of its railroad and operated it as it always operated it and without let or hindrance of the Government.

If the value of the use of appellant's railroad prior to the alleged taking is to be measured by its productiveness under the free management and operation of its own officials, then its productiveness during Federal control under the management and operation of its own officials is also the measure of the value of its use, except in so far as it is shown that such management was restricted or interfered with by the Government.

Again, it is not clear to us, why the board should base the amount of compensation on anticipated earnings for a *period of years* when it was admitted that the alleged period of control was only for six months. *Knoxville* v. *Knoxville Water Company,* 212 U. S. 15; *Des Moines Gas Co.* v. *Des Moines,* 238 U. S. 153.

(1) The board of referees adopted an erroneous basis for awarding compensation, considered improper and incompetent evidence, and refused to consider competent evidence bearing on appellant's loss, if any, from the alleged taking of its property, and its report is therefore without prima facie effect

The referees adopted as the measure of compensation awarded to appellant the utmost the President was authorized by Section 1 of the Federal Control Act to agree to pay to any carrier whose

property was actually taken and operated by the Government. (R. 13.)

In adopting such measure the board assumed the relation of lessor and lessee between the appellant and the Government. In its report the board said:

> The board finds the compensation for the use of plaintiff's railroad property should be calculated upon the basis of an implied lease by the government and agreement to pay the fair rental therefor. (R. 12.)

In the succeeding paragraph of the report, however, it is said:

> There is no evidence as to the amount for which the railroad could have been rented, and there is no likelihood that there was any market for its rental. (R. 12.)

If it be assumed that appellant's railroad was taken into the possession and control of the Government, such possession was not that of a tenant or lessee, but was in the exercise of the power of eminent domain. In *North Carolina R. R. Co.* v. *Lee,* 260 U. S. 16, it is said:

> Under the Federal Control Act the government operates a railroad, not as lessee, but under a right in the nature of eminent domain.

In *E. I. DuPont de Nemours* v. *Davis,* 264 U. S. 456, it is said:

> In taking over and operating the railroad systems of the country the United States did so in its sovereign capacity as a war

> measure, under a right in the nature of eminent domain. (*North Carolina Railroad Co.* v. *Lee,* 260 U. S. 16.)

It is true that in taking property for public use under the power of eminent domain an implied promise to make compensation is assumed. Such compensation, however, is to be measured by the loss such taking causes the owner. *United States* v. *New Rivers Collieries Co.,* 262 U. S. 341, 343, 344.

In *Brooks-Scanlon Corporation* v. *United States,* 265 U. S. 106–123, it is said:

> It is settled by the decisions of this court that just compensation is the value of the property taken at the *time* of the taking. (Italics ours.)

The thing taken, in the instant case, if anything, was the use of appellant's railroad. The compensation, if any, appellant is entitled to is the value of such use "at the time of the taking." The board, however, allowed the value of the use during the three-year period ending June 30, 1917, instead of the period of alleged Federal control. It is shown that conditions during the three-year period, adopted by the board, were vastly different from the conditions during the period of alleged Federal control of appellant's railroad. The board not only adopted such prior period, but allowed the utmost amount Congress authorized the President to agree to pay any carrier whose property was acually taken and operated by the Government. The board apparently fell into such error by assum-

ing the President was required to pay for the use of a railroad under Federal control the maximum amount authorized by Congress in Section 1 of the Federal Control Act; and that such provision was, in effect, a guaranty that a carrier under Federal control would be paid such amount. There is no basis, however, for such assumption. The Act authorized the President to—

> agree with and guarantee to any such carrier compensation in an annual sum * * * *not exceeding* a sum equivalent as nearly as may be to its average annual railway operating income for three years ended June 30, 1917. (Italics ours.)

It will be noted there is a vast difference between authorizing the President to pay a sum *not exceeding* a certain amount, and authorizing him to pay *such certain amount.* The effect of such authority to the President is to permit him to agree to pay a sum *not exceeding* a certain amount, and leaving to his discretion, in a particular case, whether he shall pay such full amount or a lesser sum. It is true that Section 1 of the Act permitted the President to pay an amount in excess of such average annual operating income for the period described, in cases where unusual conditions were presented, such as receivership, extensions, new equipment and improvements, earnings from which were not fairly reflected in the test period. Nothing of such character is presented in this case, and the President was limited

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to the average annual operating income of appellant during the test period. The statute, barring such exceptional cases, fixed the maximum beyond which the President could not go, but left to his discretion the amount he would agree to pay within such maximum. If the loss to the carrier in the taking was, in the judgment of the President, less than such maximum amount, he was bound to agree to pay less than such maximum amount. He was not authorized to pay more than the carrier's loss resulting from the taking. If the condition of the carrier, or of traffic, or of business at the time of the taking was such as to make the average income from the test period excessive compensation, the President was bound to agree to pay less than such average annual income. The President was bound, if he made an agreement, to make one within the limits prescribed and just to the United States as well as to the carrier. In addition to adopting the wrong theory of the law, the board of referees refused to give any consideration to the actual results of operation of appellant's railroad under its own management during the time for which it is claiming compensation, and relied entirely on the operating results during the test period in arriving at the amount of compensation awarded. The report and allowance of the board of referees, being based upon such errors, is without prima facie effect. (See *Meeker* v. *Lehigh Valley R. R. Co.,* 236 U. S. 442, 428; *Pennsylvania Railroad Company* v. *Jacoby,* 242 U. S. 89.)

That such errors destroyed the prima facie effect of the report is held by the Court of Claims in its opinion in this case. (R. 42.)

(J) Allowance by board of referees for maintenance and depreciation

The board of referees, in addition to awarding appellant compensation on the basis of its average annual operating income for the three-year test period, allowed for depreciation and undermaintenance of appellant's railroad during the period January 1 to July 1, 1918, the aggregate sum of $4,697.37, of which $2,514.87 was for depreciation, and $2,182.50 was for undermaintenance. These allowances were based on the average charges made by appellant in its books for such matters during the three-year test period. Equation factors were applied to take care of the higher cost for labor and materials during the period of alleged Federal control. (R. 18, 19, 20, 21, and 22.)

The computation relied upon by the board is shown in tabulated statement at pages 20 and 21 of record. It will be noted that appellant charged to depreciation during entire year ended June 30, 1917, only $894.12 (R. 41); while the board awards depreciation in the sum of $2,514.87 for the six-months' period in controversy; such amount being one-half the alleged annual depreciation charged on appellant's books for the three-year test period ended June 30, 1917.

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The undermaintenance allowed is arrived at by taking the difference between one-half of the average annual expenditures for maintenance during the three-year test period and the amount expended by appellant for maintenance during the time in controversy, after applying equation factors based upon higher costs during the period of alleged Federal control.

The allowance, so far as depreciation is concerned, is thus seen to be a mere bookkeeping transaction, and is not based on any actual depreciation.

The allowance for maintenance involves merely a difference in expenditures during the two periods, without any showing that the condition of the property was such as to justify greater maintenance expenditures. The failure to expend a greater amount for maintenance rests with appellant. It followed its own judgment and discretion in the premises. It had a net income which could have been so expended if it had thought further expenditures were desirable. It did not consult the Government, and the Government gave it no suggestions. In view thereof, the following observation of the Court of Claims is particularly apt:

> If the plaintiff did not adequately maintain its property while it was in its own possession, and being used by it to the exclusion of the United States and everybody else, is it possible that the United States must pay the plaintiff for the maintenance of its property? (R. 45.)

The depreciation of appellant's railroad, as well as the necessary expenditures for maintenance, would have been the same if the Government had done none of the things relied upon by appellant as a taking of its property. Appellant suffered no loss in these respects on account of alleged Federal control of its railroad. The allowance by the board would make the Government liable for matters for which it was not responsible, and would give to appellant compensation for a loss it did not suffer.

CONCLUSION

We, therefore, conclude that appellant's railroad was not taken under Federal control; that its railroad remained in its own possession and was operated by plaintiff in accordance with its own judgment and discretion, free from any interference by the government during the entire time in controversy; that if there was a technical or nominal control of appellant's property by the Government, same did not cause appellant any loss or damage and does not entitle appellant to any compensation from the Government; that if there was interference by the Government with appellant's railroad, the evidence is insufficient to show any actual loss or damage; that the report of the board of referees can not take the place of evidence or have any prima facie effect as showing the amount of loss, if any, suffered by the appellant, or the

amount of compensation, if any, to which it is entitled on account of the acts of the Government, for the reason that the same is based on erroneous conception of the relation of the Government to appellant's property, and because of erroneous views of law, reliance on improper testimony, and the refusal to consider proper testimony bearing upon the question of loss, if any, suffered by the appellant on account of the things done by the Government and of which appellant complains; and, further, that the evidence shows conclusively that appellant has received and retains the net income resulting from the operation and use of its property during the time in controversy, which net income measures the value of the use of appellant's said property during said time, and constitutes the full measure of compensation to which appellant would be entitled, if it be assumed that its railroad was actually taken and used by the Government.

The conclusion of the Court of Claims is announced in the following language:

> We think that the property of the plaintiff was not taken by the Government. If there was a technical control of the property by the Government, it was of such a character that it did not cause any loss to the plaintiff and does not justify the award of any compensation.

We think the conclusion of the Court of Claims is correct and should be affirmed. We respectfully so ask.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.

A. A. MCLAUGHLIN,
General Solicitor,
United States Railroad Administration.

SIDNEY F. ANDREWS,
General Attorney,
United States Railroad Administration.

DECEMBER, 1925.

APPENDIX

[PUBLIC—No. 107—65TH CONGRESS]

[S. 3752]

AN ACT TO PROVIDE FOR THE OPERATION OF TRANSPORTATION SYSTEMS WHILE UNDER FEDERAL CONTROL, FOR THE JUST COMPENSATION OF THEIR OWNERS, AND FOR OTHER PURPOSES

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President, having in time of war taken over the possession, use, control, and operation (called herein Federal control) of certain railroads and systems of transportation (called herein carriers), is hereby authorized to agree with and to guarantee to any such carrier making operating returns to the Interstate Commerce Commission, that during the period of such Federal control it shall receive as just compensation an annual sum, payable from time to time in reasonable installments, for each year and pro rata for any fractional year of such Federal control, not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June thirtieth, nineteen hundred and seventeen.

That any railway operating income accruing during the period of Federal control in excess of such just compensation shall remain the property of the United States. In the computation of such income, debits and credits arising from the ac-

counts called in the monthly reports to the Interstate Commerce Commission equipment rents and joint facility rents shall be included, but debits and credits arising from the operation of such street electric passenger railways, including railways commonly called interurbans, as are at the time of the agreement not under Federal control, shall be excluded. If any lines were acquired by, leased to, or consolidated with such railroad or system between July first, nineteen hundred and fourteen, and December thirty-first, nineteen hundred and seventeen, both inclusive, and separate operating returns to the Interstate Commerce Commission were not made for such lines after such acquisition, lease, or consolidation, there shall (before the average is computed) be added to the total railway operating income of such railroad or system for the three years ended June thirtieth, nineteen hundred and seventeen, the total railway operating income of the lines so acquired, leased, or consolidated, for the period beginning July first, nineteen hundred and fourteen, and ending on the date of such acquisition, lease, or consolidation, or on December thirty-first, nineteen hundred and seventeen, whichever is the earlier. The average annual railway operating income shall be ascertained by the Interstate Commerce Commission and certified by it to the President. Its certificate shall, for the purpose of such agreement, be taken as conclusive of the amount of such average annual railway operating income.

Every such agreement shall provide that any Federal taxes under the Act of October third, nineteen hundred and seventeen, or Acts in addition

thereto or in amendment thereof, commonly called war taxes, assessed for the period of Federal control beginning January first, nineteen hundred and eighteen, or any part of such period, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation; that other taxes assessed under Federal or any other governmental authority for the period of Federal control or any part thereof, either on the property used under such Federal control or on the right to operate as a carrier, or on the revenues or any part thereof derived from operation (not including, however, assessments for public improvements or taxes assessed on property under construction, and chargeable under the classification of the Interstate Commerce Commission to investment in road and equipment), shall be paid out of revenues derived from railway operations while under Federal control; that all taxes assessed under Federal or any other governmental authority for the period prior to January first, nineteen hundred and eighteen, whenever levied or payable, shall be paid by the carrier out of its own funds, or shall be charged against or deducted from the just compensation.

Every such agreement shall also contain adequate and appropriate provisions for the maintenance, repair, renewals, and depreciation of the property, for the creation of any reserves or reserve funds found necessary in connection therewith, and for such accounting and adjustments of charges and payments, both during and at the end of Federal control as may be requisite in order that the property of each carrier may be returned to it in substantially as good repair and in substantially as complete equipment as it was in at the beginning

of Federal control, and also that the United States may, by deductions from the just compensations or by other proper means and charges, be reimbursed for the cost of any additions, repairs, renewals, and betterments to such property not justly chargeable to the United States; in making such accounting and adjustments, due consideration shall be given to the amounts expended or reserved by each carrier for maintenance, repairs, renewals, and depreciation during the three years ended June thirtieth, nineteen hundred and seventeen, to the condition of the property at the beginning and at the end of Federal control and to any other pertinent facts and circumstances.

The President is further authorized in such agreement to make all other reasonable provisions, not inconsistent with the provisions of this Act or of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, that he may deem necessary or proper for such Federal control or for the determination of the mutual rights and obligations of the parties to the agreement arising from or out of such Federal control.

If the President shall find that the condition of any carrier was during all or a substantial portion of the period of three years ended June thirtieth, nineteen hundred and seventeen, because of non-operation, receivership, or where recent expenditures for additions or improvements or equipment were not fully reflected in the operating railway income of said three years or a substantial portion thereof, or because of any undeveloped or abnormal

conditions, so exceptional as to make the basis of earnings hereinabove provided for plainly inequitable as a fair measure of just compensation, then the President may make with the carrier such agreement for such amount as just compensation as under the circumstances of the particular case he shall find just.

That every railroad not owned, controlled, or operated by another carrier company, and which has heretofore competed for traffic with a railroad or railroads of which the President has taken the possession, use, and control, or which connects with such railroads and is engaged as a common carrier in general transportation, shall be held and considered as within "Federal control," as herein defined, and necessary for the prosecution of the war, and shall be entitled to the benefit of all the provisions of this Act: *Provided, however,* That nothing in this paragraph shall be construed as including any street or interurban electric railway which has as its principal source of operating revenue urban, suburban, or interurban passenger traffic, or sale of power, heat and light, or both.

The agreement shall also provide that the carrier shall accept all the terms and conditions of this Act and any regulation or order made by or through the President under authority of this Act or of that portion of the Act entitled "An Act making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes," approved August twenty-ninth, nineteen hundred and sixteen, which authorizes the President in time of war to take possession, assume control, and utilize systems of transportation.

UNITED STATES RAILROAD ADMINISTRATION

GENERAL ORDER NO. 3

All carriers by railroad subject to the jurisdiction of the undersigned are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs effective January 21, 1918, wherein demurrage rules, regulations, and charges shall be changed so as to provide—

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.

(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. Demurrage charges per car per day or fraction of a day until car is released, as follows: $3 for the first day, $4 for the second day, and for each succeeding additional day the charge to be increased $1 in excess of that for the preceding day until a maximum charge of $10 per car per day shall be reached on the eighth day of detention beyond free time, the charge thereafter to be $10 per car per day or fraction thereof. These charges will supersede all those named in existing tariffs applicable to domestic freight, and specifically contemplate the cancellation of all average-agreement provisions of existing tariffs.

No change is authorized hereby to be made in demurrage rules, regulations, and charges applying on foreign export freight awaiting ships at export points.

Upon my request, the Interstate Commerce Commission has issued Fifteenth Section Order

No. 25, authorizing the filing of tariffs to accord with this order to become effective January 21, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate State commissions or other State authorities.

Dated at Washington this 5th day of January, 1918.

W. G. McAdoo,
Director General of Railroads.

Director General of Railroads,
Interstate Commerce Building,
Washington, D. C.

ORDER NO. 7

All carriers by railroads, subject to the jurisdiction of the undersigned, are hereby ordered and directed forthwith to publish and file, and to continue in effect until further order, tariffs in the form shown in the attached appendix, effective February 10, 1918, wherein demurrage rules, regulations, and charges shall be changed so as to provide:

A. (1) Forty-eight hours (two days) free time for loading or unloading on all commodities.
(2) Twenty-four hours (one day) free time on cars held for any other purpose permitted by tariff.

B. That the average agreement rule be permitted, but that it apply solely to cars held for unloading.

C. That under the average rule the number of days on which debits accrue be made four instead of five.

D. That the demurrage charge on all cars, after the expiration of the free time allowed, be $3 for each of the first four days, $6 for each of the next three days, and $10 for each succeeding day.

E. That the bunching rule be reinstated with the following change in paragraph 2:

Cars for unloading or reconsigning.—When, as the result of the act or neglect of any carrier, cars originating at the same point or at intermediate points moving via the same route and destined for one consignee, at one point, are bunched at originating point, in transit, or at destination, and delivered by the carrier in accumulated numbers in excess of daily shipments, the consignee shall be allowed such free time as he would have been entitled to had the cars been delivered in accordance with the daily rate of shipment. Claim to be presented to carriers' agent within fifteen (15) days.

These charges will supersede all those named in any existing tariffs applicable to carload freight except:

1. Cars loaded with live stock.
2. Empty cars placed for loading coal at mines or mine sidings or coke at coke ovens and cars under load at mines or mine sidings or coke at coke ovens.
3. Foreign export freight awaiting ships at ports.
4. Coal for transshipment at tidewater or lake ports.
5. Empty private cars stored on railroad or private tracks, provided such cars have not been placed or tendered for loading on the orders of a shipper.

and specifically contemplate the cancellation of all conflicting provisions of existing tariffs.

Upon my request the Interstate Commerce Commission has issued Fifteenth Section Order No. 300, authorizing the filing of tariffs to accord with the appendix hereto and to become effective February 10, 1918, on one day's notice.

Carriers shall immediately file said tariffs with appropriate State commissions or other State authorities.

Order No. 3 is hereby withdrawn and canceled.

Washington, D. C., January 29, 1918.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Office of the Director General,
Washington, D. C., March 14, 1918.

GENERAL ORDER NO. 10

Each and every carrier subject to Federal control shall, prior to May 1, 1918, commence taking an inventory of its materials and supplies by actual count, measurement, weight, etc., and shall immediately upon completion thereof adjust such inventory, by additions and deductions, to December 31, 1917; provided, however, that any such carrier that has taken an inventory of its materials and supplies in the form indicated within 90 days prior to December 31, 1917, or subsequent to the latter date, shall not be required to take an additional inventory, but shall adjust the inventory previously taken, by additions and deductions, to December 31, 1917.

The said inventory shall be preserved in the files of the carrier.

W. G. McAdoo, *Director General.*

UNITED STATES RAILROAD ADMINISTRATION,
DIRECTOR GENERAL OF RAILROADS,
Washington, March 21, 1918.

GENERAL ORDER NO. 12

It is ordered that the following rules be observed with respect to all railroad work involving charges to capital account, viz:

First. In determining what additions and betterments, including equipment, and what road extensions should be treated as necessary, and what work already entered upon should be suspended, please be guided by the following general principles.

(*a*) From the financial standpoint it is highly important to avoid the necessity for raising any new capital which is not absolutely necessary for the protection and development of the required transportation facilities to meet the present and prospective needs of the country's business under war conditions. From the standpoint of the available supply of labor and material, it is likewise highly important that this supply shall not be absorbed except for the necessary purposes mentioned in the preceding sentence.

(*b*) Please also bear in mind that it may frequently happen that projects which might be regarded as highly meritorious and necessary when viewed from the separate standpoint of a particular company, may not be equally meritorious or necessary under existing conditions, when the Government has possession and control of the railroads generally, and therefore when the facilities heretofore subject to the exclusive control of the separate companies are now available for common use, whenever such

common use will promote the movement of traffic.

Second. The construction of new lines or branches or extensions of existing lines shall not be entered upon or contracted for without the Director General's approval.

Third. No new locomotives or cars shall be ordered or constructed without the Director General's approval.

Fourth. Work contracted for or actually commenced prior to January 1, 1918, and unfinished, may be continued until further order, except in so far as in the judgment of the carrier concerned it may be possible to discontinue or curtail it without substantial loss, in order to conform to the general principles outlined in paragraph "First" hereof.

Fifth. Other work which does not involve charges to capital account in excess of $25,000 may be contracted for and commenced without approval of the Director General, provided that—

(*a*) It conforms to the policy outlined in paragraph "First" hereof; that

(*b*) It also falls clearly within the policy of the particular carrier as that policy has been applied in practice during the two calendar years 1916 and 1917; and that

(*c*) A report giving a brief description of each project involving not less than $5,000 nor more than $25,000 chargeable to capital account and showing also the amount chargeable to operating expenses, shall be made in duplicate to the Director of the Division of Capital Expenditures at Washington and regional director for the district within 10 days after the work shall be contracted for or commenced.

Sixth. No work involving a charge to capital account in excess of $25,000 shall be contracted for or commenced subsequent to January 1, 1918, unless—

(*a*) It conforms to the policy outlined in paragraph "First" hereof; and unless

(*b*) It be authorized by the Director General.

Seventh. The Director of the Division of Capital Expenditures is authorized to prescribe such forms, require such reports and issue such regulations and instructions as may be necessary to carry out this order.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Director General of Railroads,
Washington, March 26, 1918.

GENERAL ORDER NO. 15

The following requirements must be observed in respect of the construction, maintenance and operation of new industry tracks, and in respect of the operation and maintenance of existing industry tracks:

1. As to new industry tracks:

(*a*) The industry shall pay for, own and maintain that part of the track beyond the right of way of the railroad company.

(*b*) The railroad company shall pay for, own and maintain that part of the track on the right of way from the switch point to the clearance point.

(*c*) Generally speaking, an industry shall pay for and maintain (although in special

cases the railroad company may do so), and the railroad company shall own that part of the track on the right of way from the clearance point to the right of way line.

(*d*) If the industry fails to maintain in reasonably safe condition the part of the track which it is required to maintain, the railroad company may disconnect the track or refuse to operate over it when not in such condition.

(*e*) The railroad company shall have the right to use the track when not to the detriment of the industry.

(*f*) The foregoing terms and conditions should be embodied in a written contract between the industry and the railroad company.

2. Where existing industry tracks are not covered by written contracts, they shall be maintained and operated in accordance with the provisions stated in paragraph 1 hereof.

3. Where industry tracks are covered by written contracts, such contracts shall be adhered to until otherwise ordered; but where any such contracts appear to work inequalities or injustice the circumstances should be brought to the attention of the regional director, who will report thereon onto the Director General, if conditions seem to warrant.

4. The requirements of State statutes and of State commissions in respect of the construction, maintenance, and operation of industry tracks shall be complied with, but in cases where such compliance involves what appears to be an unreasonable burden upon the United States Railroad Administration the circumstances should be brought to the attention of the regional director, who will report

thereon to the Director General, if the conditions seem to warrant.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Director General of Railroads,
Washington, D. C., April 3, 1918.

GENERAL ORDER NO. 17

To Chief Executive Officers of Carriers Subject to Federal Control:

It is hereby ordered that the following rules and regulations shall be observed and shall govern the recording of and accounting for all transactions which arise during Federal control:

(1) For accounting purposes Federal control began as of January 1, 1918. Immediate steps shall be taken by each carrier subject thereto, to open new and separate books of accounts, such as cash books, general and subsidiary ledgers and journals, and all supporting and subsidiary books and records incident thereto, upon which shall be recorded transactions which arise under and are incident to Federal control on and after January 1, 1918. Such books shall be designated and are hereinafter referred to as "Federal Books."

(2) The totals of the accounts "Cash," "Demand loans and deposits," and "Time drafts and deposits" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to accounts of the same titles, and credited to a deferred liability account styled "(Name of corporation)—Cash—December 31, 1917." On the corporate books the amount

of such balances should be transferred to a deferred asset account styled "U. S. Government—Cash—December 31, 1917." All cash transactions subsequent to December 31, 1917, relating to operations prior or subsequent thereto, shall be recorded in the Federal cash book opened as of January 1, 1918.

(3) The total of account "Net balance receivable from agents and conductors" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Agents' and Conductors' balances—December 31, 1917." On the corporate books the amount of such balances should be transferred to a deferred asset account styled "U. S. Government—Agents' and Conductors' balances—December 31, 1917."

(4) The total of account "Materials and Supplies" appearing on the corporation's books as of December 31, 1917, shall be transferred to the Federal books, debited to an account of the same title, and credited to a deferred liability account styled "(Name of corporation)—Materials and Supplies—December 31, 1917." On the corporate books the amount of such balance should be transferred to a deferred asset account styled "U. S. Government—Material and Supplies—December 31, 1917."

(5) In addition to the assets above specified, there shall be likewise transferred to the Federal books and similarly recorded thereon, such other working assets of the corporation as may be mutually agreed upon.

(6) There shall be currently entered, upon such Federal books, in the manner and under the rules

and regulations prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, all transactions involving revenues, expenses, taxes and rentals, and other items corresponding to those which constitute the basis upon which the standard return to the carrier shall be determined. Such entries shall include corresponding assets and liabilities and the cash settlement thereof; also all transactions involving materials and supplies subsequent to December 31, 1917.

(7) Transactions of the corporation, including those arising out of cash receipts or disbursements, which do not affect or which do not enter into and form a part of those used in determining the basis of standard return, such as interest and dividends received or paid, miscellaneous rents, and other similar corporate transactions, including additions and betterments, shall not be recorded on or passed through such Federal books unless such transactions be negotiated and conducted for account of the corporation by or under the direction of the Director General. Where such income transactions are negotiated and conducted by or under the direction of the Director General the transactions shall be recorded on the Federal books but credited or charged to an account to be opened, styled "(Name of corporation)—Materials and Supactions." Concurrently, corresponding entries should be made on the corporate books charging or crediting the accounts prescribed by the Interstate Commerce Commission or which may hereafter be prescribed, the offset being in an account styled "U. S. Government—Corporate income transactions." Where additions and betterments are

made by or under the direction of the Director General, the expenditures shall be charged on the Federal books to a deferred-asset account "(Name of corporation)—Additions and Betterments." Concurrently, entries should be made on the corporate books, charging the appropriate accounts and crediting a deferred-liability account "U. S. Government—Additions and Betterments."

(8) Current or operating assets, other than those prescribed in paragraphs (2), (3), (4) and (5) hereof, such as, balances due from individuals and companies, and liabilities, such as, vouchers, pay rolls, etc., which were due to or by the corporation as of December 31, 1917, shall not be transferred in detail to the Federal books; but as and when such assets are collected or the liabilities are paid, they shall be credited or debited as the case may be, on the Federal books to a deferred liability account styled "(Name of corporation)—Assets, December 31, 1917, collected," or to a deferred asset account "(Name of corporation)—Liabilities, December 31, 1917, paid." There should be concurrently made, on the corporate books, corresponding entries debiting and crediting the U. S. Government with assets collected and liabilities paid.

(9) Transactions relating to operations, as defined in paragraph (6) hereof, if not previously accrued, shall be included in and shall form a part of the operating results of each carrier regardless of the date thereof. Items clearly applicable to the period prior to January 1, 1918, commonly called "lap-overs," shall be ascertained currently, set up on the Federal books, and included in the appropriate accounts as heretofore. At the end of

each month, the total of " lap-over " credit items shall be charged to an unadjusted debit account styled " Revenue prior to January 1, 1918," and credited to a deferred liability account styled "(Name of corporation)—Revenue prior to January 1, 1918." The total of " lap-over " debit items shall be credited to an unadjusted credit account styled "Expense prior to January 1, 1918," and charged to a deferred asset account styled "(Name of corporation)—Expense prior to January 1, 1918." Operating revenues which have been accrued currently in accordance with the established practice of the carrier, shall be considered as current revenues and not as " lap-over " items.

(10) The accounts between the U. S. Government and the corporation, for which provision is made herein, shall be adjusted in such manner as may be hereafter agreed upon.

(11) Inquiries as to the interpretation and application of the provisions of this order and the procedure to be observed under its requirements shall be addressed to the Director of Public Service and Accounting.

W. G. McAdoo,
Director General of Railroads.

For information only

UNITED STATES RAILROAD ADMINISTRATION,
OFFICE OF THE DIRECTOR GENERAL,
Washington, D. C., April 22, 1918.

GENERAL ORDER NO. 20

Effective at once, technical and arithmetical examination and checking of all operating bills such as bills for freight and other claims, joint facili-

ties, car repairs, and other similar bills and all statements of accounts such as distribution of freight and passenger revenues and other similar statements, rendered by one carrier subject to Federal control to or against another carrier subject to Federal control, which accrued or which may accrue on or subsequent to January 1, 1918, shall be discontinued. The carrier rendering such statements, bills, etc., shall take the necessary measures to insure the correctness thereof.

W. G. McAdoo,
Director General of Railroads.

For information

UNITED STATES RAILROAD ADMINISTRATION,
OFFICE OF THE DIRECTOR GENERAL,
Washington, D. C., May 2nd, 1918.

GENERAL ORDER NO. 23

Each and every carrier subject to Federal control shall render a weekly cash report on Form T–5, as per copy herewith.

The first report shall be rendered as of May 4, 1918.

W. G. McAdoo,
Director General of Railroads.

UNITED STATES RAILROAD ADMINISTRATION,
OFFICE OF THE DIRECTOR GENERAL,
Washington, D. C., May 16, 1918.

GENERAL ORDER NO. 24

On April 30th, a telegram was sent to carriers, instructing them not to renew any expiring fire

insurance policies on property in Federal control, and not to take out any new fire insurance policies upon such property. It was provided that carriers might call attention to cases calling for exceptional treatment. A letter was sent to the carriers confirming this telegram, and the letter suggested care for fire prevention in terms similar to the last paragraph of this order.

It is desired to extend the instructions to other insurance than fire insurance, excepting only bonds or policies insuring fidelity of employes in handling funds.

Carriers, therefore, are now instructed not to renew any expiring insurance of any character, covering property in Federal control, or any liability in connection with the operation or use of any such property, or liability for property transported or stored by carriers under Federal control, and not to take out any new policies, or place any additional or new risks under existing policies, of such insurance, except that this order shall not relate to bonds or policies insuring the fidelity of employes in handling funds. Such fidelity bonds or policies shall be continued, and proper provision made for any necessary changes, as heretofore. Carriers may present to the Director General any special circumstances which they believe call for exceptional treatment.

If the termination of insurance in accordance with this order results, as to any particular property, in the discontinuance by the Insurance Company of inspection or other measures for prevention of loss, it will be desirable to adopt proper substitute therefor, and the carrier shall make reasonable and proper temporary provision for

such inspection or other preventive measures, reporting its action to this office.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Director General of Railroads,
Washington, D. C., May 20, 1918.

GENERAL ORDER NO. 25

Effective July 1, 1918, the collection of transportation charges, by carriers under Federal control, for services rendered, shall be on a cash basis, and, effective as of that date, credit accommodations then in existence which may be in conflict with the following regulations shall be canceled.

(1) Tickets shall be sold only for cash in advance of service. Baggage charges are subject to the same rule as tickets, except C. O. D baggage, and storage charges, which must be paid in cash before delivery.

(2) In cases where the enforcement of this rule, with respect to freight, will retard prompt forwarding or delivery of the freight or the prompt release of equipment or station facilities, carriers will be permitted to extend credit for a period of not exceeding forty-eight (48) hours after receipt for shipment of a consignment if it be prepaid, or after delivery at destination if it be a collect consignment, provided the consignor if it be a prepaid consignment, or the consignee if it be collect, file a surety bond either individual or corporate, in an amount satisfactory to the Treasurer of the carrier. The form of such bond shall be prescribed by the chief legal officer of the individual carrier, conditioned upon and providing for payment of all

charges within forty-eight (48) hours after forwarding or delivery of the freight. Upon receipt and acceptance of such bond a carrier may accept and forward prepaid consignments or may deliver collect consignments in advance of payment of all charges thereon to the amount covered by the bond. Failure to pay such charges within the time prescribed will automatically cancel such credit.

(3) Treasurers of individual carriers are required to arrange and conduct all matters relating to such credits. They shall designate the amount, and accept or reject the surety offered. Bonds may be required and accepted for individual consignments or blanket bonds may be accepted from individual shippers or consignees to cover all of their consignments for a given period, the period of the credit in such cases shall, however, be limited to forty-eight (48) hours on each shipment as prescribed in the preceding paragraph.

(4) In case of any question as to the accuracy of charges, bills must be paid as rendered and claims presented for alleged errors. This will not prevent adjustments by agents of obvious errors.

(5) Freight consigned to " order " or to " order notify " shall be delivered only upon surrender to the agent of the carrier of the original bills of lading for such freight, and the payment of the freight charges thereon as herein provided. Provided, however, if such bill of lading be lost or delayed the freight may be delivered in advance of surrender of the bill of lading upon receipt by the carrier's agent of a certified check for an amount equal to one hundred and ten (110) per cent of the invoice, or upon receipt of a surety bond either individual or corporate, acceptable to the Treas-

urer of the carrier in an amount for twice the amount of the invoice.

(6) The extension or creation of Local Collection Bureaus or agencies will be authorized by the Director of Public Service and Accounting, as and when such Bureaus may be found to be necessary or expedient.

(7) Bonding or Underwriting arrangements with respect to credits extended, now in effect by individual carriers, shall be discontinued as of July 1, 1918, or as soon thereafter as existing contracts are terminable.

(8) Advice of the foregoing regulations shall be promptly given to all to whom credit accommodations are now given to the end that the regulations may be put into effect at the time specified with as little inconvenience as possible.

(9) Payment of transportation charges by check will be considered as a payment in cash if the person, firm, or company signing or endorsing it is known to the agent to be fully reliable. Checks are not to be taken or cashed by agents under any circumstances except for transportation charges.

(10) Until otherwise ordered the foregoing rules will not apply to transportation service rendered other Departments of the Federal Government.

W. G. McAdoo,
Director General of Railroads.

UNITED STATES RAILROAD ADMINISTRATION,
OFFCE OF THE DIRECTOR GENERAL,
Washington, June 12, 1918.

GENERAL ORDER NO. 30

Settlement of inter-road bills and accounts

Effective July 1, 1918, the following regulations shall govern the settlement of all inter-road bills, statements, and accounts rendered by one carrier under Federal control against or for account of another carrier under such control.

(1) Settlements by vouchers and the drawing of drafts in settlement of individual inter-road bills, statements, and accounts rendered by one carrier under Federal control against another carrier under such control, except as provided for in paragraph (2) hereof, shall be discontinued.

(2) The regulations herein prescribed shall not include:

(*a*) Settlement of accounts between a carrier under Federal control and a carrier not under such control.

(*b*) Settlement of accounts between carriers under Federal control for transactions which do not properly belong on the Federal books of either carrier interested.

(3) Each bill, statement, or account made and rendered by one carrier under Federal control against or in favor of another carrier under such control, and forwarded on and after July 1, 1918, shall be plainly stamped on the face thereof, as follows: "Included in settlement, month of ------ 191__." Such stamp shall indicate the month in which the amount represented by the account will

be included for settlement by the carrier rendering the account, and it shall be included in the same month's settlement account by the receiving carrier. No such bill, statement, or account made and rendered in one month shall be back-dated for a prior month.

(4) On the first of each month each carrier shall prepare and render each other carrier with which it has inter-road transactions, as a basis for a settlement for the month just ended, a statement of debits and credits, in abstract, showing the nature and total of each bill, statement, or account forwarded by it to each other carrier during the preceding month.

(5) There shall be opened as of July 1, 1918, on the Federal books of each carrier, a clearance or settlement account with each other carrier under Federal control with which it has inter-road transactions.

(6) As inter-road bills, statements, or accounts are made and rendered they shall be charged or c redited as the case may be, through the clearance or settlement account prescribed in the preceding paragraph.

(7) As inter-road bills, statements, or accounts are received they shall be:

(*a*) Examined as to correctness, as prescribed in General Order No. 20;

(*b*) Charged or credited to the appropriate operating or other account;

(*c*) Credited or charged (as the case may be) by the receiving carrier to the carrier originating the account through the appropriate clearance or settlement account prescribed in paragraph (5) hereof.

(8) The total of each statement for a given month shall be accepted as rendered, and on or before the fifteenth day of each month subsequent to that for which such statement was rendered the creditor carrier shall draw upon the debtor carrier for the balance between the two statements exchanged by them.

(9) In the event the statement referred to in paragraph (4) indicates that the originating carrier has charged or credited the other carrier with a bill, statement, or account which has not been received, the carrier to which the statement is rendered shall accept the account and credit or debit the originating carrier therewith to the debit or credit of a suspense account. Such receiving carrier shall immediately take the matter up with the originating carrier for the purpose of locating the missing bill, statement, or account. If it be found that such amount was included in the statement in error, adjustment shall be made therefor in a subsequent statement. If manifest errors be found in such statements by a receiving carrier, the attention of the originating carrier shall be called thereto and such error or errors shall be adjusted in the statement for the subsequent month.

W. G. McAdoo,
Director General of Railroads.

United States Railroad Administration,
Office of the Director General,
Washington, D. C., June 12, 1918.

GENERAL ORDER NO. 31

Effective July 1, 1918, the following rules and regulations shall govern the accounting for the use

of equipment or facilities of one carrier under Federal control by or for the account of another carrier under such control, provided, nothing herein contained shall be construed to warrant the discontinuance of the keeping, rendition, and settlement of such accounts by a carrier under Federal control in favor of or against a carrier not under Federal control, in the same manner as heretofore.

I. *Hire of freight and passenger train equipment.*

1. The practice of recording, computing, and paying per diem, mileage, or rental for the use of freight and passenger train cars of one carrier under Federal control by or for account of another carrier under Federal control, and the adjustment of differences, reclaims, etc., between such carriers which clearly relate to transactions incurred on or after January 1, 1918, shall be discontinued.

2. Junction cards, interchange reports, location records, and all other records and reports necessary to determine the location of equipment shall be kept, rendered, and compiled as heretofore.

II. *Joint facilities, bills for use of.*

3. Effective with costs incurred on and after July 1, 1918, bills rendered by one carrier under Federal control against another carrier under such control for maintaining and operating (including taxes and rentals) tracks, yards, terminals, and other facilities, including costs to operate equipment used therein, shall be computed, rendered, charged, and paid on the following bases:

(*a*) In cases where the tenancy is not changed under Government operations: The total cost of maintenance, operation,

taxes and rental, as provided for under existing agreements, and the amounts thereof borne by each user, for a period not less than six months ended December 31, 1917, shall be determined by the owning or operating carrier. From such costs, the percentage of the total borne by each user to the total costs shall be determined. The percentages thus determined shall be applied monthly to the total costs incurred on and after July 1, 1918, and bills shall be rendered and paid on the results thus obtained.

(*b*) In cases where tenants or users are admitted to facilities not heretofore jointly used: Federal Managers of the facilities to be jointly used shall determine, as between themselves, a fair and equitable arbitrary basis for the apportionment of the total costs of maintenance, operation, taxes and rental which should be paid by each tenant. Such basis shall thereafter during the period of Federal control be used by the owning carrier as a basis for preparation and rendition of bills against the tenants or users, and such tenants or users shall pay such bills as rendered.

(*c*) In cases where the number of tenants or users of facilities now used by tenants under agreements with owners is increased or decreased: The literal compliance with the terms of such agreements shall be temporarily suspended, for the period of Federal control, and a fair and equitable basis of use shall be determined as prescribed in paragraph (*b*) preceding, except that due regard shall be given to the terms of existing agreements in fixing such arbitrary basis.

(*d*) In cases where a lump sum charge has been made by an owning or operating carrier which is under Federal control for

the use of a facility used by another carrier which is under such control, such bills for the lump sum charge shall be rendered and paid during Federal control as heretofore; provided, however, if there be a change in such tenancy by the admittance of other tenants or otherwise, and the contractual basis upon which the lump sum charge is made be disturbed thereby, an arbitrary basis of charge by the owner against the tenant or tenants shall be determined as prescribed in paragraph (*b*) hereof.

4. Details heretofore required in support of joint facilities bills, statements, and accounts shall be discontinued, except that such bills shall show the totals chargeable and creditable, to the primary operating revenue, expense, tax and rental accounts prescribed by the Interstate Commerce Commission, or which may hereafter be prescribed.

5. If materials and supplies, the value of which is carried in the accounts of one carrier under Federal control, be used by another carrier under such control for maintaining or operating equipment or facilities jointly used, the value at which such materials and supplies are carried in the accounts of the carrier furnishing them shall be billed against and paid for by the carrier using them as heretofore, except that percentages for overheads and other carrying expenses shall not be added to the cost thereof.

W. G. McAdoo,
Director General of Railroads.

APPOINTMENT OF FEDERAL MANAGERS

May 21, 1918.

In view of the direct responsibility for the operation of the railroads of the country placed upon

Director General McAdoo by the act of Congress and by the proclamations of the President, he has been unable to escape the conclusion that it will be advisable to place in direct charge of each property for operating purposes a representative to be known as the Federal manager, who will report to the Regional Director. As far as practicable, this Federal manager will be chosen from the operating officers of the particular property, who are therefore entirely familiar with its employees and with its conditions. Except so far as may be necessary to meet the emergency conditions which compel the Government to take control of the railroads, the Federal manager of each railroad will endeavor to avail himself to the fullest extent of the advantages incident to the operation of the particular railroad as a unit and the preservation of its identity. This is believed to be of essential importance, not only to secure the best results during the period of Government control but also to give the greatest degree of reassurance to the officers and employees that the railroad careers upon which they have entered will not be narrowed, but, if anything, will be broadened, and to give the greatest possible reassurance to the stockholders that their just interests in the properties will be respected and that nothing will be needlessly done to have even the appearance of impairing their just rights.

While in this way the responsibility for the operation of the property will be directly to the Regional Directors and not to the boards of directors, it is the purpose of the Director General to accord to the boards of directors and their representatives the fullest opportunity to keep advised as to the operation and improvement of the properties

and to maintain with the Director General and the Regional Directors the fullest interchange of views as to what is in the best interest of the Government and of the stockholders.

In the development of this policy the Regional Directors and also the Federal managers will be required to sever their official relations with the particular companies and to become exclusive representatives of the United States Railroad Administration.

The first moves in the inauguration of this policy will be through the creation of two new regions to be known as the "Allegheny Region" and the "Pocahontas Region."

The Allegheny Region will consist, broadly, of the Pennsylvania lines east of and including Pittsburgh and Erie, Baltimore & Ohio, east of Pittsburgh and Ohio River including Pittsburgh terminals, Bessemer & Lake Erie Railroad, Cumberland Valley Railroad, Central Railroad of New Jersey, Coal & Coke Railroad, Philadelphia & Reading Railway, Western Maryland Railway, Cumberland & Pennsylvania, and Pittsburgh & Lake Erie. This region will be placed in charge of Mr. C. H. Markham as Regional Director (who has resigned his connections with the Illinois Central and other companies), who will have offices in Philadelphia.

The Pocahontas Region will consist of the Chesapeake & Ohio Railway east of Columbus, Cincinnati, and Louisville, the Norfolk & Western Railway, and the Virginian Railway, including the terminals of all lines at Hampton Roads. With the exception of the Allegheny and Pocahontas Regions, the Eastern Region will remain as originally

defined, with Mr. A. H. Smith as Regional Director, and district directors under Regional Director Smith will be appointed for New England and for that portion of the Eastern Region west of Pittsburgh and Ohio River and south of the Erie main line. The selection of the Regional Directors for the Pocahontas Region and for the Southern Region, succeeding Mr. Markham, as well as of the two new district directors under Regional Director Smith, will be announced later.

The same policy will be applied from time to time as rapidly as may be convenient in other parts of the country, always with the greatest possible regard for all the interests affected and with a view to preserving intact, as far as reasonably practicable, the operating organizations of the companies.

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 315

MARION AND RYE VALLEY RAILWAY COMPANY, Appellant

v.

THE UNITED STATES, APPELLEE

APPEAL FROM THE COURT OF CLAIMS

REPLY OF THE UNITED STATES TO BRIEF OF VICTOR A. REMY AS AMICUS CURIAE

In Division II of Mr. Remy's brief is presented the contention that the United States is estopped in this suit from denying that appellant's railroad was under Federal control during the period in controversy. We will address this reply solely to that contention.

ARGUMENT—SUMMARY

I

The matters relied upon do not estop the United States from denying claim of appellant that its railroad was under Federal control

(a) *The Interstate Commerce Commission was not authorized to determine whether or not appellant's railroad had been taken by the President*

and its action in performing the duties created by Section 204 Transportation Act could not control the action of the President in the performance of his duties created by the Federal Control Act.

(b) *If the Interstate Commerce Commission exceeds its jurisdiction or makes a finding of fact without evidence, or an arbitrary disregard of the evidence, or erroneously applies the law to the facts found, its conclusions are not conclusive even in respect of matters committed to it for determination.*

(c) *Appellant does not rely upon an estoppel.*

I

The matters relied upon do not estop the United States from denying claim of appellant that its railroad was under Federal control

(a) *The Interstate Commerce Commission was not authorized to determine whether or not appellant's railroad had been taken by the President and its action in performing the duties created by Section 204 Transportation Act could not control the action of the President in the performance of his duties created by the Federal Control Act.*

The claim of estoppel is based on application made by appellant to the Interstate Commerce Commission for reimbursement for deficit resulting from operation of its railroad during that portion of Federal control of railroads during which its railroad was not Federally operated, and upon refusal of the Commission to make appellant any

allowance for the period in controversy, because of its conclusion that appellant's railroad during such time was under Federal control.

Provision for such reimbursement is made in Section 204, Transportation Act 1920 (41 Stat. 460), set out in full at page 5 of Appendix to Mr. Remy's brief. It will be noted that the administering of such section is confided to the Interstate Commerce Commission. No express provision is made for a hearing or any judicial proceeding. There is no provision for making the President or the Director General of Railroads or any one representing the United States Railroad Administration a party to any procedure the Commission might adopt in administering the act. The only parties involved are the Commission on the one side and the applicant on the other.

While it may be the Interstate Commerce Commission represents the United States in administering the act, if such be the case, it is a representative of limited and special authority confined to the particular matter. The Commission's conclusion that appellant's railroad was under Federal control in such sense as to deprive appellant of the right to be reimbursed for its deficit during such period is not binding on the President in administering the Federal Control Act, and does not control him, in exercising the authority granted to him under such act.

Congress created the Interstate Commerce Commission an agency for one purpose, and the Presi-

dent an agency for another purpose. Each was granted authority for the accomplishment of a particular matter and neither could invade the field of the other or do that which would control the action of the other. It would be subversive of the public interest to permit the question of whether the appellant's railroad had been taken by the President for public use to be determined in an ex parte proceeding, in which the interested party could produce or withhold such evidence as he might choose, and in which no one was authorized to appear and represent the United States and protect its interest. This is especially true where the tribunal before whom such proceeding is pending has been given no authority in the premises. The Interstate Commerce Commission was not authorized to represent the United States in such matter, nor was the Interstate Commerce Commission designated a court before whom the President and appellant might appear and have determined the question of whether appellant's railroad had been taken or was under Federal control. Indeed, Congress expressly withheld such authority from the Interstate Commerce Commission by provision in Section 3 of the Federal Control Act for the appointment of a Board of Referees by the Commission for the purpose of reporting to the President the amount of compensation, if any, to which a railroad whose property had been taken was entitled, with the right of either party to file a petition in the Court of Claims to have such matter

finally determined in the event an agreement could not be reached as a result of the report of the referees.

Such is the proceeding resorted to by appellant and now being prosecuted. In such proceeding is necessarily involved the question of whether appellant's railroad was taken and whether it was under Federal control. To permit a matter confided to a special tribunal, as in this case, to be determined against the United States in a collateral proceeding and by a representative of the United States to whom was entrusted authority in an entirely different matter would be contrary to public policy and would involve serious embarrassment and loss to the United States.

Mr. Remy relies on the opinion of the Court of Appeals of the District of Columbia in case of *Abilene Southern Railroad Co.* v. *Interstate Commerce Commission* (opinion not published, but copy set out in appendix to his brief). We do not believe such opinion aids his contention. A writ of mandamus was sought and denied on the ground that the Commission in the performance of its duties was not acting in merely a ministerial capacity, but was required to exercise a judicial discretion and, under the familiar rule, such discretion could not be controlled by mandamus. Whether the railroad company had some other remedy was not involved and the fact that the Commission's discretion will not be controlled by mandamus does not justify the conclusion that relief could not be

had in an appropriate proceeding, or that the United States will be bound in other proceedings entrusted to other representatives, by a conclusion reached by the Commission in a proceeding of the character involved.

Even if the railroad company was without remedy otherwise, rights would not be created, by the action of the Commission, against the Government in some other capacity. The Government is under no obligation in creating rights in individuals to provide a remedy for their enforcement through the courts. *United States* v. *Babcock,* 250 U. S. 328-331. The Government is immune from suits unless it consents to be sued. When it does consent to be sued the conditions imposed must be strictly followed. It consented to be sued for the taking of railroads under Federal control in the tribunals and in accordance with the method provided in the Federal Control Act. It did not consent to be made liable by a ruling of the Interstate Commerce Commission in a proceeding under some other act of Congress. To permit a liability to be so established would be in effect a recognition of a judgment against the United States rendered by a tribunal to whom jurisdiction had not been given, and in a suit brought contrary to the terms of the consent of the Government to be sued.

Mr. Remy relies on case of *Dennison* v. *Payne,* 293 Fed. 333, C. C. A. Second Circuit, but the doctrine there announced does not aid his contention. The true rule is stated in the opinion in that case

in paragraph (3-5) on page 341 of the report, to the effect that if the tribunal involved was without jurisdiction, its judgment is not merely voidable but absolutely void, and the doctrine of res judicata can have no application.

(b) *If the Interstate Commerce Commission exceeds its jurisdiction or makes a finding of fact without evidence, or an arbitrary disregard of the evidence, or erroneously applies the law to the facts found, its conclusions are not conclusive even in respect of matters committed to it for determination.*

We earnestly contend that the Interstate Commerce Commission's conclusions in administering Section 204 of the Transportation Act can in no respect bind the President in the performance of his duties, whether under the Federal Control Act or the Transportation Act. If, however, the Commission had jurisdiction in the premises, its conclusion would not operate as an estoppel in this case, since the *evdience* bearing on the question of whether appellant's railroad was taken is not in dispute and the question of whether there was a taking becomes a question of law. If the Commission erred in applying the law to the undisputed facts, its conclusion furnished no impediment to a determination of such question on its merits in this proceeding. The rule in such cases is aptly stated in *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.,* 227 U. S. 88–91–92, as follows:

> In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders quasi judicial in character are void if hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence" (citing authorities), or if the facts found do not as a matter of law support the order made. * * * In a case like the present the courts will not review the Commission's conclusions of fact by passing upon the creditability of witnesses or conflicts in the testimony. *But the legal effect of evidence is a question of law.* A finding without evidence is beyond the power of the Commission. *An order based thereon is contrary to law* and must, in the language of the statute, be "set aside by a court of competent jurisdiction." (Italics ours.)

The same rule is announced in *Interstate Commerce Commission* v. *Union Pacific Railroad,* 222 U. S. 541–547, and numerous other cases.

We conclude there is no basis for the claim of estoppel, and that the question of whether or not appellant's railroad was taken by the President must be determined in this case on its merits and upon the facts and the law presented.

(c) *Appellant does not rely upon an estoppel.*

We are not unmindful of the doctrine that to be relied upon an estoppel must be pleaded. Despite the fact that appellant has not pleaded an estoppel

and does not rely thereon, and that ordinarily under such circumstances the court will not consider such question, we desire same to be considered and disposed of in this case as though properly pleaded and relied upon by the appellant. There are a considerable number of cases of this character awaiting the final determination of this suit and it is important in aid of a speedy winding up of the affairs of the Railroad Administration that this question be disposed of, if possible, in this suit.

It is significant, however, that counsel for appellant, who has been general counsel for the association of short-line railroads from the beginning of Federal control, and who has represented them throughout in all proceedings before Congress and the courts, has not regarded the action of the Interstate Commerce Commission, relied upon by Mr. Remy, as being an adjudication, or as creating any estoppel in this suit. It has remained for a "friend of the court" to make such claim.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
A. A. MCLAUGHLIN,
General Solicitor,
United States Railroad Administration.
SIDNEY F. ANDREWS,
General Attorney,
United States Railroad Administration.

DECEMBER, 1925.

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